

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

19-101

BRIEF AND APPENDIX FOR APPELLANTS

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA ~~Circuit~~ *Court of Appeals*
For the
District of Columbia Circuit

No. 11,015 **FILED** OCT 24 1951

—
HENRY A. COLLINS, ET AL.,
Appellants,

v.

PAULINE DOBBINS, ET AL.,
Appellees.

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Appeal from the United States District Court
for the District of Columbia

—
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No. 11,015

**STATEMENT OF QUESTIONS PRESENTED
ON THIS APPEAL**

I. Whether the trial court misapplied the law in directing a verdict for the caveatees on the issue of testamentary capacity where the court found as a fact that, at the time the testatrix gave instructions for her will, her mental capacity was unquestioned, but, at the time of actual execution, she did not have the mental capacity to execute a will, deed or contract with judgment and understanding?

II. Whether the trial court erred in directing a verdict for the caveatees on the issue of due execution where, after the evidence of the caveators has established that the testatrix was in a state of near collapse, in a state of shock, and not in a physical or mental condition to exert her body or mind at the time of execution, the caveators fail to establish by affirmative and substantial evidence that the will was attested in the conscious presence of the testatrix?

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Appeal from the United States District Court
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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal by the caveators-plaintiffs from an order entered on January 29, 1951, by the United States District Court for the District of Columbia, admitting the will of Marion E. Sabbs to probate after a trial before Judge T. Alan Goldsborough with a jury resulted in a directed verdict for the caveatees-defendants on all issues framed by the pleadings. The jurisdiction of this Court to review the action of the District Court in this proceeding is invoked under the provisions of revised Title 28 of the United States Code, Sections 1291 and 1294.

STATEMENT OF FACTS

Marion E. Sabbs, a middle aged, semi-paralytic spinster and a resident of the District of Columbia, died on May 7, 1950, at Freedmen's Hospital, leaving what purported to be her last will and testament, by which she disposed of her property, both real and personal. The will was duly submitted to the United States District Court, sitting as a Probate Court, for allowance, to which her eleven heirs at law, all of whom were excluded from the dispositive scheme, interposed a formal objection to the will, by Petition for Caveat, on the grounds, among others, that the will was not the last will and testament of the decedent because the testatrix lacked the requisite mental capacity to execute such an instrument and, further, the will was not executed in conformity with the requirements which the law testamentary in this jurisdiction make and provide. Upon the caveat and the responses thereto, four issues were framed for trial: one, whether the purported will was executed and attested in due form as required by law; two, whether the decedent was of sound and disposing mind and capable of executing a valid deed or contract at the time of making, subscribing or acknowledging said paper writing; three, whether the said instrument was obtained or its execution or subscription procured from the decedent by fraud or deceit; and four, whether the paper writing was obtained or its execution procured by undue influence or duress or coercion.

After due hearing before Judge T. Alan Goldsborough and a jury, the court, upon the conclusion of the contestants' and proponents' cases and on motion of the caveatees, directed a verdict on all the issues framed for the caveatees, and thus allowed the purported will. From the evidence adduced at trial, Judge Goldsborough found, one, that at the time of execution on the afternoon of May 7, 1950, the decedent did not have the mental capacity to execute a valid will, deed or contract, two, that at the time she gave

instructions for her will on the morning of the same day, she possessed the capacity to execute a will (Appellants' App. 5) and that the testimony as to the latter finding was unchallenged and uncontroverted (Appellants' App. 2). And the court then concluded that under the circumstances as set forth all that was required of the decedent at the time of execution was the performance of the mechanical act of execution (Appellants' App. 4).

Probate was ordered and thereupon the caveators moved the trial court to set aside the verdict and enter judgment for the caveators or in the alternative, grant a new trial. The motion was denied after the court entertained argument by counsel, and an appeal was then taken to this Court.

The pertinent circumstances surrounding the execution of the purported will of Marion E. Sabbs and her untimely death began on Thursday, May 4th, three days before she departed. On that day, the decedent complained of shortness of breath and incessant substernal pains which increased in intensity on the succeeding days. (Appellants' App. 20, 21, 23). On Saturday, May 6th, Mrs. Hattie Watson, then visiting at the Sabbs' residence, became alarmed and called in Dr. Lawrence Jackson, Miss Sabbs' then attending physician. (R. 368). Dr. Jackson came to see the patient Saturday evening, and in turn called in Dr. Samuel Bullock for consultation. As a result, Miss Sabbs was ordered to the hospital and her case referred to Dr. Alvin Robinson for surgery. (R. 363).

Early the next morning, Sunday, May 7th, Mrs. Hattie Watson telephoned Mrs. Pauline Dobbins and asked her to come and help prepare Miss Sabbs for the hospital. Mrs. Dobbins arrived about 7:00 that morning. Later, at about 8:00 a.m., Mrs. Watson, at the request of the decedent, called Mr. E. B. Henderson and asked him to come to see Miss Sabbs on business. (R. 369). Mr. Henderson arrived about an hour later and from 9:30 to 11:30 a.m. was alone

with the testatrix in her upstairs bedroom. (R. 370-371). Around 10:00 a.m., Dr. Bullock telephoned and informed Mrs. Watson that he had secured a bed for Miss Sabbs at Freedmen's Hospital. Thereupon, Mrs. Watson ordered an ambulance from a local funeral establishment. (R. 368-369).

The purported will of the decedent was drafted during the morning of May 7th at the Sabbs' residence by Mr. Henderson. According to him, Miss Sabbs requested that he obtain from a closet in her bedroom a penciled memorandum and copy it for her in ink as her will. This penciled memorandum was dated April 19, 1950, but was unsigned and unattested. (R. 467-470). He copied the memorandum at her bedside, going over each provision with her. After he had completed this task, they agreed that the paper writing should be executed at the hospital since the only persons in the house were beneficiaries. With reference to her physical and mental condition during the time he was with her, Mr. Henderson testified that Miss Sabbs appeared to be perfectly normal and responsive to his conversation, that her color was natural and that she indicated no pain. (R. 365-367).

The other two persons at the Sabbs' residence on the morning of May 7th testified that they knew nothing about the drafting of the will or why Miss Sabbs desired to see Mr. Henderson on that morning, and that the first they knew of the will was after it had been signed and witnessed in the hospital (R. 370, 371). They also testified that during the morning of May 7, 1950, Miss Sabbs was cheerful, her color was natural and she did not appear to be in pain. (R. 369, 371-372).

With regard to these events and circumstances occurring prior to and on the morning of May 7th, the caveators offered no testimony because Mrs. Watson, the executrix and a beneficiary, Mrs. Dobbins, the principal beneficiary, and Mr. Henderson the draftsman and a beneficiary, were the

only persons in the house up until the arrival of the ambulance driver and his assistant at 12:30 p.m.

Mr. Wendell Rich, the ambulance driver and so employed for some fifteen years, testified that when he saw Miss Sabbs about 12:30 p.m., she appeared to be unconscious, had a bluish color, was breathing heavily and irregularly, and seemed to be in great pain. He further testified that he and his assistant had difficulty in placing her on the stretcher and getting her down the steps because she was stout and "dead weight". So far as he knew, the patient uttered not one word from the time he first saw her until he left her at Ward 10. (R. 372-373).

The decedent arrived at the hospital about 1:20 p.m. and checked in on Ward 10 at 1:30 p.m. Miss Maizene Tyree, the nurse on duty in Ward 10, received Miss Sabbs, and her entries in the clinical record indicate that at 1:30 p.m. the patient was severely short of breath (rate 40 per minute), very nervous and afraid, and her fingernails were slightly cyanotic. Her report further revealed that a Dr. Forcia was notified and responded; that within an hour the patient had five doctors (Robinson, Keller, Lloyd, Swann, and Forcia) in attendance at her bedside; that venous sections were done on both arms of the patient, and that about 2:30 p.m. a transfusion of 500 cc. of whole blood was started by one doctor and 1000 cc. of normal saline was administered into her tissues by another. (Appellants' App. 21, 22). Nurse Tyree, in a deposition read in the record by the caveatees, reported that Miss Sabbs was able to make some responses to her inquiries and carry on a conversation during the time when Nurse Tyree was preparing her for bed upon her entry into Ward 10.

The first physician to see Miss Sabbs on Ward 10 was Dr. Forcia, an intern assigned to the ward but who, at the time of trial was in the army, stationed in Louisiana. Dr. Forcia's report, also contained in the clinical record, revealed that on admission the patient complained of pain in

the chest; that patient was "evidently in heart failure", was "gasping for breath", was "extremely anxious" and cyanotic with all extremities "cold and blue". (Appellants' App. 20, 21). Moreover, her pupils were contracted and reacted only a little to light; her pulse was 36 per minute, her heart rate 88 and irregular; and her blood pressure 0/0 (Appellants' App. 20). The intern suggested that the patient be given oxygen, stimulants and fluids immediately and ordered the administration of the oxygen. (Appellants' App. 21).

Dr. James Swann, an Assistant Resident in charge of Ward 10 and Interns, was the next physician to see Miss Sabbs. He testified that when he saw the patient she was in acute respiratory distress, that is, she was breathing rapidly and suffering marked shortness of breath (R. 219); that he had been called to Miss Sabbs' bedside by Dr. Forcia; and that his examination showed Miss Sabbs to be cyanotic and in a state of shock (R. 219, 222, 230). Further, he stated that the patient appeared critically ill, that she registered no blood pressure (R. 219, 222), and that her condition was such that he called Dr. Lloyd, his immediate superior, and Dr. Alvin Robinson, the attending physician (R. 220); and that they began to make cut-downs in both arms in order to find veins into which the blood and saline solution could be injected in an attempt to save her life. (R. 232). He also stated that the patient was able to give some medical history and was suffering from a pain in the chest. (R. 233).

Dr. Alvin Robinson, Miss Sabbs' attending physician at the hospital and an attesting witness to the will, testified that he first saw the patient about 1:45 p.m., and at that time it was immediately apparent to him that she was "seriously ill". He observed that she was obviously cyanotic; her manner was depressive and apprehensive; that she was in severe pain, so excruciating that she cried out at times; that she was never able to give him a coherent medical his-

tory; and that she was in deep shock. (R. 244-248, 290). As a result of his examination he became convinced that the patient's condition was medical rather than surgical, whereupon he consulted the chief of the medical service, who, in turn, suggested Dr. Keller be called. He returned to the patient and noticed her condition was getting progressively worse and again attempted to get a medical history. At about 2:15 p.m. he put in a call to Dr. Lawrence Jackson for the purpose of securing adequate data on the patient's medical history. Dr. Robinson then testified that Mr. Henderson approached him about 2:30 p.m., very shortly before his call came through from Dr. Lawrence Jackson, and inquired about Miss Sabbs' health and whether he could be permitted to go in and get her to execute a will; that he responded by saying that Miss Sabbs was not doing so well, that they had not been able to arrive at a satisfactory diagnosis of her condition, and that he thought Mr. Henderson might be able to see her later (R. 258); that he then returned to the patient's bedside where the physicians were attempting to locate the vein in her arms in order to start the fluid; that when Dr. Lawrence Jackson's call came through he asked Dr. Jackson about the propriety of allowing Mr. Henderson to obtain Miss Sabbs' signature on a will (R. 258); that upon Dr. Jackson's assurances, he took Mr. Henderson to the bedside of the deceased around 3:00 p.m.; that the physicians suspended their medical treatment at that time to permit Mr. Henderson to see the patient; that Mr. Henderson asked him to witness Miss Sabbs' signature and sign as a witness; that Mr. Henderson had the will in his hand; that Mr. Henderson put the last page of the will before her, put a pen in her hand, and indicated where she should sign; that he or Mr. Henderson held the book or chart on which the will rested for her; that she signed the will in a hesitant manner for she seemed to be struggling for muscular control; that Mr. Henderson then asked him to sign, which he did, and to secure another witness; that

only he, Mr. Henderson and the patient were present at the time the deceased and he (Dr. Robinson) signed; that Mr. Henderson then asked him to secure another witness and he left the patient's bedside, went to Mrs. Betty Lurton and requested her to come and sign the will. He further testified that at the time of the execution of the will the patient's condition had grown progressively worse and that, in his opinion, Marion E. Sabbs could not execute a will with knowledge and undertsanding. On cross-examination, when shown his sworn statement before the Register of Wills, he still maintained his position with respect to the mental capacity of the deceased and stated that he categorically informed Mr. Shief that he was *not* going to say that at that time the patient was mentally competent "to understand what was going on insofar as that will was concerned". (Appellants' App. 9-13). Dr. Robinson further testified that Miss Sabbs was constantly receiving oxygen nasally and that it was one of the first things they administered. (R. 290).

The clinical report disclosed also the findings of an examination made by Dr. Keller, consultant, approximately one hour before her death. He indicated that the patient had no pulse, no blood pressure and was exhibiting "obvious signs of shock", and a heart rate at 75 per minute. The consultant, having taken electrocardiograph readings of the patient at 3:00 and 3:30 p.m., suggested that the patient had a dissecting aneurysm of the aorta but further stated that "pulmonary embolism cannot be excluded". (Appellants' App. 20).

Arrayed against the entries on the clinical record and the testimony of the physicians in attendance upon the decedent, Mr. Henderson testified that at the time he saw her on Ward 10, she returned his greeting and inquired what the physicians were going to do to her; and that her physical and mental condition had not changed since the morning of May 7th. (R. 366, 367).

Mrs. Betty Lurton, head nurse on Ward 10 and the last attesting witness to subscribe the purported will, testified, when put on by the caveatees to establish the factum of the will, that she signed the will between 3:00 and 3:15. (R. 60). However, on her subsequent appearance for the caveatees on the issue of testamentary capacity, she stated that she signed the will at 2:20 p.m. (R. 298). Mrs. Lurton also testified the deceased was, in her opinion, of sound mind at the time of execution, (R. 297-298), that Miss Sabbs requested her to sign the instrument, and that the patient was able to respond to her casual inquiries about how she felt. (R. 296-297).

Both Mrs. Hattie Watson and Mrs. Pauline Dobbins testified that they visited the decedent after the execution of the will; that the decedent's color was natural; that she was able to carry on a conversation; and that she did not appear to be in pain when they saw her then. (R. 369, 371). Mrs. Dobbins further testified that no one seemed to be in attendance on the decedent when she saw her on Ward 10, that Miss Sabbs conversed with her about matters pertaining to the Sabbs home, and that up until the time she left the hospital between 3:00 and 3:30 p.m., there was no change in her physical condition. (R. 371).

Dr. Calvin LeCompe, a former physician of Marion E. Sabbs, testified that he saw her on May 7th at Freedmen's Hospital and that she "seemed" to recognize him. (R. 364).

The testamentary circumstances and events concluded with the decedent's cessation of respiration at 4:15 p.m., and her being pronounced lifeless at 4:20 p.m., less than three hours after she entered Ward 10, and at a time when five physicians were at her bedside. (Appellants' App. 22).

An autopsy performed on the very obese decedent, one day after her death, determined that the immediately conditioning cause of her death was pulmonary embolism, that is, a large obstruction straddling the bifurcation of the pulmonary artery and almost completely blocking the cir-

culatation of blood into the lungs, with death resulting from the inability of the heart to pump blood past this obstruction in sufficient quantity to supply the brain and other vital organs. The autopsy report also showed that she bore a fibroid tumor of the womb which distended her abdomen to about the size of a seven and one-half months gestation. The decedent also had arteriosclerosis which impaired the function of the brain by softening and destroying localized areas of the brain substance, neprosclerosis or multiple scars on the kidneys, pulmonary edema (swelling) and congestion, and a passive congestion of the liver. (Appellants' App. 22, 23-24, 26-27, 28-29).

The summation of the decedent's medical history additionally indicates that she was partially paralyzed on the left side due to a "stroke" suffered some thirteen years prior to death; that she first complained of shortness of breath and a pain in her chest on exertion one month before death; that at the same time, her physician indicated she suffered high blood pressure (150/100). (Applicants' App. 19, 23).

Dr. Robert S. Jason, Head of the Department of Pathology, Howard University, testifying for the caveators on the basis of the autopsy and clinical reports, and as an expert, stated that in his opinion the deceased was not able to execute any important document such as deed, contract or will with judgment and understanding on the afternoon of May 7th. Further, he said that he considered it most unlikely, upon the basis of his personal experience and his professional knowledge, that she could do anything; and that the deceased, one hour before her death, was in such a condition that he could not conceive of her being able to do anything which required mental effort. (Appellants' App. 14-15, 16).

Dr. Kelley Brown, called by the caveatees as an expert and testifying from an inspection of the clinical and autopsy records of Marion E. Sabbs, stated that the records indi-

cated Miss Sabbs was in shock, suffered from extreme shortness of breath and was cyanotic. Then in response to a question put by caveators' counsel with respect to the mental capacity of the decedent to know and understand what she was doing on the afternoon of May 7th in the light of her aggregated morbidity and deterioration, Dr. Brown responded, "Under those conditions she should have been dead." (Appellants' App. 18). Conclusively illustrative of Dr. Brown's expertise is the uncontroverted fact that Marion E. Sabbs was officially pronounced dead at 4:20 p.m., Sunday, May 7, 1950, by Dr. Robinson, while Drs. Forcia, Swann, Lloyd and Keller were grouped about her bedside. (Appellants' App. 22).

STATEMENT OF POINTS

I. The trial court committed error in directing a verdict for the caveatees on the issue of testamentary capacity upon the legal ground that the requirements of testamentary capacity may be satisfied by reference to the time when the testatrix gave instructions for her will rather than to the time when the will was signed and attested.

II. The trial court committed error by directing a verdict for the caveatees on the issue of due execution, since the caveatees failed to establish by affirmative and substantial evidence that the will was attested in the conscious presence of testatrix.

SUMMARY OF ARGUMENT

The trial court in directing a verdict for the caveatees on the issue of testamentary capacity applied an erroneous principle of law in that the court held that testamentary capacity may be determined at the time the testatrix gave instructions for her will rather than at the time of execution. Such a principle violates the express mandate of Title 19, Section 101 of the District of Columbia Code and is inconsistent with the decisions of this Court construing that pro-

vision. The statute and the cases decided under it declare without exception that the time for determining the testamentary capacity of a testator is at the time of execution of the will. Moreover, the principle applied by the trial court directly repudiates the views expressed in *In re Will of John Hoover* (1891) 8 Mackey (19 D. C.) 495. In addition, the rule is not supported in the decisional law of Maryland or in the decisional law of any American jurisdiction. Furthermore, the text authorities, past and present, insist that testamentary capacity must exist at the time of execution of the will. Aside from the above considerations, the rule applied by the trial court is destructive of several sound policies and principles developed in the law of wills. It nullifies the policy of requiring attesting witnesses at the time of execution. It opens the door to fraud and imposition. It fails to protect testators against innocent mistakes of the draftsman. It destroys the right of testators to revoke, change or modify an existing plan of disposition. Whatever the effect would be in other jurisdictions, an application of the rule in the District of Columbia is practically impossible within the framework of our present law. In particular, it would disorientate our law with respect to the burden of proof on the issue of testamentary capacity and shackle the court with a rule more metaphysical and legal. Finally, if such a rule does exist under our law, the present case is not an appropriate one for its application when the facts and circumstances of the English cases which purport to apply it are properly analyzed.

The trial court also committed error in directing a verdict for the caveatees on the issue of due execution. Title 19, Section 103 of the District of Columbia Code requires that the testatrix' will be attested in her presence. Obviously, this statute requires, among other things, the "conscious" presence of the testatrix. The evidence developed by the caveators indicated that at the time of the witnessing of the will the testatrix was in a state of shock and near collapse

and in such a physical and mental condition that she could not exert her body or mind. Under these circumstances the principle of law established in the "lucid interval" cases should apply and the caveatees should have the burden of proving due execution of the will by producing affirmative and substantial evidence that the two attesting witnesses subscribed to the testatrix' will in her conscious presence. No such evidence was offered by the caveatees and hence any directed verdict on this issue should have been in favor of the caveators.

ARGUMENT

I

In directing a verdict for the caveatees on the issue of testamentary capacity the court applied erroneous principles of law. Preliminary to the court's conclusions and the direction to the jury, the trial court found as a fact that Marion E. Sabbs did not have the mental capacity to execute a valid deed or contract at the time of actual execution of the alleged will. Judge Goldsborough in giving the court's conclusions stated: "It is undoubtedly true that at the time of the execution of this paper this lady was very sick; there is no doubt that she was in a condition of near collapse, physically and mentally, and there is no doubt that she was not in a condition to execute a serious document, such as a will or deed or contract, with judgment and understanding. But that is not the situation we are confronted with." (Appellants' App. 5) The court then went on to hold that such capacity is unnecessary here because the testatrix had previously instructed a person to prepare her will and he had so prepared it and the testatrix has signed it. (Appellants' App. 5, 6).

The appellants here raise no issue with respect to the correctness of the trial court's findings of fact as to mental capacity at the time of execution. Appellants' statement of

the case reviews all of the pertinent evidence of mental capacity at the time of execution. This evidence was of such a conclusive character that only one reasonable conclusion could have been drawn by the court or a jury.

The appellants do contend, however, that the trial court erred in its application of the rule of law to the facts found for the following reasons:

- (1) The rule of law applied in this case violates the express mandate of our statute, District of Columbia Code (1940), Title 19, Section 101.
- (2) The rule of law applied in this case is in conflict with principles previously established by the decisional law of the District of Columbia.
- (3) The rule of law applied in this case is wrong in principle.
- (4) The rule of law applied in this case is impossible of application within the framework of our present law in the District of Columbia.
- (5) There was no proper factual basis for the application of the rule of law applied in the instant case.

The rule of law applied in this case violates the express mandate of our statute, District of Columbia Code (1940), Title 19, Section 101.

In support of the rule of law, applied in the instant case, the trial court relied upon Note 3 of an annotation in L.R.A. 1918 D at page 748 (Appellants' App. 4), which note cited two (2) English cases, *Parker v. Felgate* and *Perera v. Perera*. In *Parker v. Felgate* (1883) L.R. 8 Prob. Div. 171, the testatrix employed a *solicitor* and over a period of time discussed, drafted, and re-drafted a proposed plan of disposition. Entries of these instructions were made on the books of the *solicitor*. After the testatrix's extreme illness, involving periods of profound insensibility, one of her doc-

tors in the presence of several disinterested persons, made inquiries about her proposed will, during the course of which the testatrix expressly indicated to them her willingness to sign the proposed will and have it take effect. In submitting the case, the court said:

“If a person has given instructions to a solicitor to make a will and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far, ‘I gave my solicitor instructions to prepare a will making certain dispositions of my property.’”

On the basis of this summation these questions were put to the jury:

1. “Did the deceased when the will was executed remember and understand instructions she had given to Mr. Parker?”

Answered by the jury: “No.”

2. “Could she if it had been thought advisable to arouse her have understood each clause if it had been put to her?”

The jury answered: “No.”

3. “Was she capable of understanding, and did she understand, that she was engaged in executing the will for which she had given instructions to Mr. Parker?”

The jury answered: “Yes.”

Afterwards a rule nisi for a new trial was obtained but the case was compromised. *Parker v. Felgate* (1883) L.R. 8 Prob. Div. 171, 173-175.

This view was approved in *Perera v. Perera* (1901) L.R.A.C. 354, 2 B.R.C. 33, in a situation where a *notary public* drafted a will under the instructions of the testator and testator signed in extremis. In the course of the opinion of the court it was observed that others knew of the instructions, that the notary was acting in his professional capacity and that there was a prolonged period of negotia-

tion concerning the will. Moreover, the court, although approving of the *Parker v. Felgate* principle, *added they saw no reason to doubt the testimony of the witnesses that the testator had the requisite mental capacity when the will was executed.* An exhaustive examination of English and American cases show that the *Parker v. Felgate* rule has been referred to in one case by the Probate Division, *Thomas v. Jones* (1928) L.R.A.C. 162 and in the Canadian cases—*Kaulbach v. Archbold* (1901) 31 Can. S. C. 387; *Faulkner v. Faulkner* (1920) 60 Can. S. C. 386; and *Rogers v. Davis* (1932) Can. S. C. 407. We find no American case citing these three English cases or the three Canadian cases.

It is apparent, however, that the court in reliance upon these cases did hold that the testamentary capacity at the time of giving instructions for the will affects the measure of capacity which must exist at the time of execution. This we claim is in violation of the statutes of the District of Columbia.

The pertinent statute of the District of Columbia reads as follows:

“No will, testament, or codicil shall be good and effectual for any purpose whatever unless the person making the same be, if a male, of the full age of twenty-one years, and if a female, of the full age of eighteen years, and be at the time of executing or acknowledging it, as hereinafter directed, of sound and disposing mind and capable of executing a valid deed or contract.”
D. C. Code (1940), Title 19, Section 101.

It is, of course, familiar to this Court that the immediate genesis of the District of Columbia statute with reference to testamentary capacity is the Maryland statute. That statute as it presently reads:

“No will, testament or codicil shall be good and effectual for any purpose whatsoever, unless the person making the same be at the time of executing or acknowledging it as hereafter directed, of sound and disposing

mind, and capable of executing a valid deed or contract. No will, testament or codicil shall be good and effectual to pass any interest or estate in any lands, tenements or incorporeal hereditaments, unless the person making the same, if a male, be of the full age of twenty-one years, and if a female, of the full age of eighteen years." Anno. Code of Maryland, Flack, Article 93, Sec. 335 (1939).

It appears that Maryland and the District of Columbia are the only jurisdictions in the United States which by legislation have imposed, in addition to a sound and disposing mind, the requirement that the testator be capable of executing a valid deed or contract. 27 L.R.A. (NS) 53. The legislation in other jurisdictions varies in some degree. Green, Milton D., "The Operative Effect of Mental Incompetency on Agreements and Wills," 21 Tex. L. Rev. 554, 580. (For a digest of the statutes relating to wills, see Thompson on Wills, Pocket Supplement, 1948.) Since a higher standard of testamentary capacity is required in the District of Columbia and Maryland, ability to execute a valid deed or contract, decisional law interpreting this statutory requirement, must be limited in scope to cases decided in the District of Columbia and Maryland.

The rule of law applied in the instant case raises, with reference to the District of Columbia statute, two (2) questions:

1. What is the standard of mental capacity, and
2. At what time is the standard to be applied in any given case?

The Maryland courts have explained this standard by the following language:

"The written law of this state furnishes the rule by which the capacity of a testator is to be measured; and the inquiry must always be, whether, at the time of executing or acknowledging the will or testament, he

was capable of executing a valid deed or contract; that is here, the standard by which the mental capacity of a testator is to be ascertained, and no *inferior grade of intellect will suffice.*" (Emphasis added by the court.) *Davis v. Calvert* (1883) 5 G. & J. (Md.) 269, 300; see also *Tyson v. Tyson* (1872) 37 Md. 567, 582; *Connelly v. Beall* (1893) 77 Md. 116, 26 A. 408.

In *Lyon v. Townsend* (1914) 124 Md. 163, 176, 91 A. 704, the court said:

"This Court has frequently been called upon to define the testamentary capacity which a testator is required to possess in order to make a will. Its decisions upon that subject have uniformly held, with slightly varying forms of expression, that *such capacity consists in the possession by the testator at the time of making his will of a full understanding of the nature of the business in which he is engaged; a recollection of the property of which he intends to dispose and the persons to whom he means to give it; and also an understanding of the manner in which he in fact disposes of it, and of the relative claim of the different persons who are or should be the object of his bounty.*" (Emphasis added).

The Maryland court has followed these essentials of mental capacity without deviation. See *Brown v. Fidelity Trust Company*, (1915) 126 Md. 175, 181, 94 A. 523; *Wood v. Hankey*, (1918) 133 Md. 389, 391, 105 A. 430; *Drury v. King*, (1943) 182 Md. 95, 32 A. 2d 371; *Riggs v. Safe Deposit and Trust Company*, (1946) 186 Md. 54, 46 A. 2d 97; and *Lynn v. Magness*, (1948) — Md. —, 62 A. 2d 604.

As it can be observed, the Maryland test, unlike many jurisdictions, involves three (3) elements:

1. Memory and knowledge
2. Understanding
3. Judgment

As to the question of at what time is the standard to be applied in any given case, the Maryland cases hold that the

only time at which this test of mental capacity can be applied is at the time of execution or acknowledgment of the will.

In *Davis v. Calvert*, (1883) 5 G. & J. (Md.) 269, 300, the court said:

“that state of mental capacity is to be determined by the condition of the testator’s mind at the time of his executing or acknowledging the will or testament.”

In *Bell v. Wolfkill* (1927), 152 Md. 407, 416, 137 A. 35, the court observed:

“The law presumes every man to be sane and to possess the requisite capacity to make a valid will. * * * And before evidence can be held to be legally sufficient to overthrow that presumption, it must be directed to the date of the execution of the will and must tend to show that the testatrix was at that time incapable of making a valid deed or contract.” (Emphasis added.)

In 1948, the Maryland court, in considering the mental capacity necessary for a person to change a beneficiary in an insurance policy stated that “the degree of mental capacity necessary to change the beneficiary in a life insurance policy is the same as that necessary to execute a will or a valid deed or contract * * * and [that] capacity must be directed to the date of execution of the will or contract * * *” *Lynn v. Magness* (1948) — Md. —, 62 A. 2d 604, 607.

An examination of the decisional law of the District of Columbia shows that this jurisdiction has adopted the same standard for mental capacity and has applied that standard as of the time of execution or acknowledgment of the will.

In *Barbour v. Moore* (1894) 4 App. D. C. 535, the court applied the Maryland standard as established in *Davis v. Calvert*, supra. The language of the Barbour case was later approved in *Lewis v. American Security and Trust Company* (1923) 53 App. D. C. 258, 260, 289 F. 916, which was decided under our present code provisions. In the latter

case, the court likewise observed that "substantially the same test is applied in Maryland. *Lyon v. Townsend*, 124 Md. 163, 91 Atl. 704."

In *Thompson v. Smith* (1939) 70 App. D. C. 65, 103 F. 2d 936, the court approved of the *Lewis v. American Security and Trust Company* standard of testamentary capacity and held that the same standard is to be applied in cases where the testator is aged, sick or in extreme debility. The court observed that in all cases the question is whether the person has ample capacity to understand the effect of her deeds she had made and to decide intelligently whether or not she should have made them. (See page 75.)

In *McCartney v. Holmquist* (1939) 70 App. D. C. 334, 335, 106 F. 2d 855, the court adopts the views expressed in the Thompson case without question.

In *Stewart v. Elliott* (1883) 2 Mackey D. C. App. 307, 318, the court stated:

"The statute, while discarding the idea that a less degree of mental capacity would suffice for the validity of a will than was requisite in the case of a deed or contract, equally dispenses with any greater mental ability. It suggests a test which a jury might readily apply to the case in hand, by reflecting, whether, if the instrument had been a contract or a conveyance, transferring part or all the property of the testator, for an inadequate consideration, they could under the proof decide that the claimant was justified in dealing with the dying man under the existing circumstances."

It is our conclusion that the District of Columbia cases, both before and after the effective date of the present provisions of our code, have applied substantially the same test for mental capacity as the Court of Appeals of Maryland, and that test for mental capacity under the present code requires:

1. Memory and knowledge
2. Understanding
3. Judgment

The testator has got to know the contents of his will; he has got to understand, as a layman, the provisions of his will and at the time of execution he has got to bring to bear his judgment upon such provisions to deliberate whether or not he desires to carry them out.

Coming to the time at which the standard of mental capacity is to be applied, we find that the District of Columbia courts are in complete agreement with the Maryland rule.

No case has been found in the District of Columbia where any exception has been made to the view that we apply the standard of mental capacity at the time of execution of the will. In *Barbour v. Moore*, supra, the court stated at 547:

“Whether the testator was capable, at the time of executing the paper purporting to be his will, of making a valid deed or contract, is the question in all such cases as the present, that must be decided. This is the test prescribed by the Maryland Statute of 1798, Ch. 101, enforced in this District and few questions are attended with greater difficulty. The incapacity alleged must exist at the time of making the will. The proof of incapacity at any prior or subsequent time, while it may furnish evidence reflecting on testator’s mind at the date of the will, will not relieve the party assailing the will from the necessity of establishing by clear proof, the existence of the mental incompetency at the time of executing the paper.”

In accord: *National Safe Deposit Savings and Trust Company v. Heiberger* (1902) 19 App. D. C. 506, 522; *Lewis v. American Security & Trust Company*, supra; *Thompson v. Smith*, supra.

In *Keely v. Moore* (1904) 196 U. S. 38, the Supreme Court upheld the Circuit Court of Appeals for the District of Columbia in their action in admitting a will to probate where the testator, a former inmate of an asylum, had been released only three weeks before the execution of the will in question. The caveator attempted to put the testator’s

admission to the asylum and the affidavits of insanity made by the testator's doctor in evidence. The court refused to admit them, maintaining that it was his mental capacity at the time of execution of the will which was material and such factors did not demonstrate insanity at the time of executing the will.

Consequently, since our statute and its interpretation by our court requires that at the time of *execution or acknowledgment*, the testator have memory and knowledge of his will, that he understands the provisions of the will and the disposition he is making and that he is possessed of sufficient judgment to, at that time, be capable of executing a valid deed or contract, an application of the Parker rule violates the express mandate contained in Title 19, Section 101 of the District of Columbia code, and in effect amounts to judicial emasculation of legislative intent in the operation of the statute.

The rule of law applied in this case is in conflict with principles previously established by the decisional law of the District of Columbia and Maryland.

The rule of law applied by the court in the instant case is that mental capacity may be tested at a period different than at the time of execution of the will, or that a lower standard of mental capacity may under the circumstances of the present case be sufficient at the time of the execution of the will. We find no warrant in the decisional law of the District of Columbia or Maryland for the court's decision. Quite to the contrary, the views of this jurisdiction have been *an entire repudiation of any such notion* and we consider the instant case to be governed by the language of *In re Will of John Hoover* (1891) 8 Mackey (19 D. C.) 495, 508:

"The question to be decided by the jury as to the competency of a testator to make a will, involves the inquiry whether he was of sufficient mental soundness to change any previously existing purpose he might have formed if he should subsequently desire to do so.

The mere fact that a will is in the direction of a preconceived purpose should have no weight, unless the testator was, at the time of executing the will, of sound and disposing mind; otherwise, the will of an evident imbecile or madman must stand, notwithstanding it appeared that although dictated or even written by himself when entirely competent, it had not been executed until incompetency had developed itself." (Emphasis added.)

There appear to be no reported decisions from Maryland on the question in issue in this case. However, as we have already indicated, the Maryland court has insisted that the prerequisite mental capacity must exist at the time of the execution of the will—not before and not afterwards.

At least two Maryland cases, however, may be called to the court's attention, for it is apparent in both that if the Maryland court had such a rule as declared in *Parker v. Felgate*, it had, to say the least, a fair opportunity to announce such a rule in these cases.

In *Struth v. Decker* (1904) 100 Md. 368, 369-370, 59 A. 727, the testator dictated his instructions for his will at a time, when according to the available testimony, he was mentally competent to do so. He executed the will at a time when it was alleged that he was mentally incompetent. The trial court's instructions directing the standard of mental capacity be applied at the time of the execution of the will, were approved by the Court of Appeals of Maryland without the slightest suggestion that the mental capacity of the testator at the time of his instructions for the preparation of the will would lessen the standard of mental capacity at the time of execution.

Moreover, the court expressly observed at page 374 that the question is whether "*he possessed the requisite testamentary capacity at the time of its execution . . .*" (Court's emphasis.)

In *Grill v. O'Dell* (1910) 113 Md. 625, 647-648, 77 A. 984, it is quite apparent that the Maryland court considered testimony of the mental capacity of the testatrix before the exe-

cution as quite immaterial, and the material and substantial testimony as that concerning the mental capacity at the time of the execution of the will.

At this juncture it might be well to examine a third case by the Maryland court. In *Weems v. Weems*, (1862) 19 Md. 334, the undisputed facts indicate that the testator whose estate consisted of personal property had become greatly enfeebled in body and by long continued and severe illness, gave instructions, on the morning of July 3, 1859, for the preparation of his will; that the paper propounded as such was prepared in accordance with the instructions given, and executed by him late in the evening of the same day. The life of the testator terminated on the sixth (6th) day of July, three days after the execution of that paper. The court concluded that the testator had sufficient soundness of mind to dispose of his property by will when he gave instructions for preparing the paper propounded as his will, and that he actually intended to execute that paper when written as his will and that such intention continued until he was deprived of the capacity to execute such an instrument by "Act of God".

However, it must be remembered that the Weems Case involved only personal property and the law of Maryland was *then* similar to the English Statute of Frauds of 1677 as embodied in the Maryland Act of 1810, Chapter 34. Under this Act there was no requirement that a will of personalty be attested. In fact, no witnesses were required, no signature of the testator was required, and the will need not have been in his handwriting. It was sufficient without more to show that he *intended* the very paper to be his will of personal property. Thus in the case of wills of personal property the question was not whether the testator was relieved of any formal requirements of execution *because there were none*. The only question was whether he *intended* that which he had accomplished as of the time of his death to operate as his will. Obviously, the Weems Case

is not in point and cannot be offered in support of the issue here involved. The Maryland courts have made this clear and have pointed out the distinctions in wills involving real property and those concerning personal property at the time when the distinction was significant. See *Telghman v. Stewart* (1816), 4 H. & J. (Md.) 156, 167; *Morsell v. Ogden* (1865) 24 Md. 377; *Byers v. Hoppe* (1883) 61 Md. 206; *Tabler v. Tabler* (1884) 62 Md. 601.

Likewise, the courts of the District of Columbia before the present code provisions made the same distinctions between wills of personal and real property. *Darrell v. Brooke* (1859, C.C.D.C.), 2 Hayw. & H. 329, Fed. Cas. No. 18, 287; *In re McIntire* (1860, C.C.D.C.), 2 Hayw. & H. 339, Fed. Cas. No. 8, 823. Fortunately, the law with respect to wills of personal property was changed many years ago both in Maryland and in the District of Columbia, and now wills of personal property require the same statutory formalities as those which apply to real property. See *Colonna v. Alton* (1904), 23 App. 296, 303. Hence, the *Weems* case and no other case involving the devolution of personal property by will prior to the statutory requirements of formal execution as to wills of personalty is in point.

We find no American case citing or approving of the Parker rule. We find no American case purporting to follow the Parker rule either insofar as the Parker rule may be interpreted as referring to some other time for testing mental capacity other than time of execution or insofar as the Parker Rule can be interpreted as requiring a lower standard of mental capacity at the time of execution.

Moreover, our research reveals that the only cases which purport to follow the Parker Rule are English and the Canadian cases.

All the text authorities, past and present, say that the standard of testamentary capacity is to be applied at the time of the execution of the will. Those that make any exception whatsoever point only to *Parker v. Felgate* and

Perera v. Perera and English and Canadian cases, purporting to follow them. 1 Page on Wills (Lifetime Ed. 1941) Sec. 111; Rollison on Wills (1939) Sec. 54; Thompson on Wills (1947) Sec. 53; 1 Jarman on Wills (7th Ed. 1930) Ch. III, Sec. 2; Atkinson on Wills (1937) 192. (American authority is that capacity at the time of giving instructions is not sufficient.) See 57 Am. Jur. Sec. 76.

“A few courts have taken the position that the existence of testamentary capacity at the time of giving instructions for the making of a will may affect the measure of capacity which must exist at the time of execution. Accordingly it has been held that, where requisite mental capacity to make a valid will existed at the time of giving instructions therefor, it is sufficient if, at the time of its execution, a testator comprehends that he is giving effect to this previously formed testamentary purpose, although he is now unable to follow the provisions of the will. *A testator should, however, have capacity to change any previously existing testamentary purpose, and it would seem insufficient that he have capacity only to know that he is executing a will formerly dictated without being able to recollect and approve the provisions made in distribution of his property.*” Gardner, *The Law of Wills* (2d Ed. 1916) pp. 89-90. (Emphasis added.)

Several of the State courts when faced with a situation similar to the present case have flatly refused to apply the Parker Rule under any interpretation.

In *Aurand v. Wilt* (1848) 9 Pa. 54, 57, the leading case in Pennsylvania on this question, the court carefully, searchingly and critically examined the application of such a principle, and then repudiated it, even under a statute which relieved a testator in extremis from formal execution of his will.

As late as 1950, the Pennsylvania court reaffirmed the principle of the *Aurand* case in a situation which bears some similarities to the present one. See *In re Lewis' Estate*, (1950) 364, Pa. 225, 72 A. 2d 80.

In *James White Memorial Home v. Haeg* (1903) 204 Ill. 422, 68 N.E. 568, where the one who drew the will testified that the testatrix was competent to make a will on the night it was drawn, but the two subscribing witnesses testified that she was of unsound mind when she signed the will the next morning, it was held that the jury were properly instructed that if she was insane at the time she signed the instrument it would not be her will even though she were rational and performed rational acts at the time the will was drawn, the will depended for its validity upon her sanity at the time of the signing.

And in *Terry v. Davenport* (1908), 170 Ind. 74, 83 N.E. 636, an instruction that if the testator was of sound mind at the time his will was prepared, but afterwards, and before it was signed, he was stricken with disease, then if he had mind enough at the time the will was signed to know the business with which he was engaged and that he was signing the will he had already prepared, the will is not invalid on the ground of unsoundness of mind, was held to be too narrow, the court saying that it was not enough to know that he was executing a will that he had previously dictated, but that he should also have been able to recollect and approve the provisions he had made in the distribution of his property.

In *In re Ross' Will* (1921) 182 N.C. 477, 109 S.E. 365, 366 the court held:

"The competency of the testatrix to make the will in question is to be determined as of the date of its execution . . . and not when instructions for its preparation were given . . . Of course, the conduct of the testatrix at the time of this conference is competent and relevant, as bearing upon the question of her testamentary capacity; but, notwithstanding her mental condition at that time, this would not necessarily establish her competency to execute the will at the subsequent date. 28 R.C.L. 93. The above special instruction, however, takes no note of this difference in time and really makes her capacity at the time of the conference, and

not at the date of signing, the test of her ability to execute the will. This is not in keeping with the law as heretofore declared.

In Re Coop (1889) 24 N.Y.S.R. 417, 6 N.Y.S. 664, it was held that where it appeared the testatrix was so weak that she could only make her mark on the execution of the will, and that immediately afterward she was in a dazed and stupefied condition, she did not have testamentary capacity, although the will was drafted from instructions given her attorney some time before, and although the latter testified that he read the paper over to her, and asked her whether it was her last will and testament, and that she answered, "Yes."

Other cases seem to affirm this principle in New York. See *Alston v. Jones* (1853) 17 Barbour (N.Y.) 276; *In Re Barbi-neau's Will*, (1899) 59 N.Y.S. 375; *In Re Feeney's Will* (1907) 55 Misc. 158, 106 N.Y.S. 464; *In Re Choate's Will* (1905) 110 App. Div. 874, 96 N.Y.S. 380; and *In Re Costos' Will* (1941) 25 N.Y.S. 2d 306.

It has been suggested that some American cases do support the Parker principle. It is our contention that such a conclusion, however, is not sound. A clear analysis of the cases will reveal that each state's standard of testamentary capacity was complied with at the time of the signing of the will. This adequately explains the view taken in *Hathorn v. King* (1812) 8 Mass. 371. The court indicated that if the testatrix could recall the particulars of her will she was of sound and disposing mind and memory under the Massachusetts standard.

O'Brien v. Dwyer et al., (1889) 45 N.J. Eq. 689, 17 A. 777, is cited in 2 British Ruling Case Law at page 43 as supporting in part the Parker Rule. Even a cursory reading of the case indicates that it does not do so. The court expressly held that it was necessary for the testatrix at the time she signed the will to have judgment *to reconsider her previous plan of disposition*.

In *Re Wilde* (1902) 38 Misc. 149, 77 N.Y.S. 164, the court admitted to probate a will drafted by the testatrix' executor from a memorandum. At the time of execution the testatrix was ill and could not speak. The will was read to her and she nodded. The witnesses were present and they all signed together. The court observed that the will ordinarily would not be admitted to probate because the testatrix was unable to direct any provision which she might desire to have the will contain or protest against any of the provisions as it was drawn, but since the testatrix *understood and gave her assent* by nods of the head and *appreciated the circumstances at the time of execution*, the will would be admitted to probate. Hardly is the court saying any more than the testatrix had testamentary capacity at the time of the signing of her will. If the blind man can make a will, obviously one who has an impairment of the speech can do so as long as he has sufficient knowledge, understanding and judgment.

In our judgment, an application of the Parker Rule in the present case would be a clear violation of Title 19, Sec. 101 as previously indicated, and in addition such application would be contrary to that decisional law which now exists in the District of Columbia and Maryland. We further submit in our opinion that there is no support for the Parker Rule among American authorities and in the decisions of the American courts.

Such case authority, if it exists, would not be applicable in the District of Columbia because the higher legislative standard of testamentary capacity, ability to execute a valid deed or contract, existing in this jurisdiction, could not be satisfied by applying any such rule.

The rule of law applied in this case is wrong in principle.

The rule of law as applied in the instant case is wrong in principle for the following reasons:

The rule (1) nullifies the policy of requiring attesting

witnesses; (2) it opens the flood-gates to fraud and fails to protect against innocent mistakes; (3) it destroys the right of the testatrix to revoke, change or modify an existing plan of disposition.

The whole purpose of statutes giving effect to the dispositive plan of testators is founded upon the notion of maximum protection of such testators against imposition and fraud. This accounts for the principles of subscribing witnesses, their presence and observation of the testator, and of rules requiring disinterested witnesses.

It is elementary that a will is an instrument which speaks for a person when he cannot speak for himself. Rigid observation of these rules has led to defeating the testator's expressed intention in some individual cases, but it must always be remembered that the legislative bodies have created these formalities in furtherance of a sound public policy against imposition and fraud. Much more harm would be done by judicial relaxation of the standards than by strict observance of them. Obviously, the only justification for resorting to the rule of law applied in this case was to aid the specific testatrix in effectuating what the trial court conceived to be her true dispositive plan. But in doing so what has happened to the requirement of attesting witnesses in this case? The trial court observed that her mental capacity at the time of giving instructions for her will was not contested. And it might be added that neither was it attested to by the attesting witnesses. The draftsman-beneficiary and two other beneficiaries performed the duties of the attesting witnesses, and the attesting witnesses became supernumeraries. What even the attesting witnesses testified to concerning the testatrix's mental condition at the time of actual execution became immaterial.

To sustain the legal conclusion of the trial court is to render impotent the requirement of attesting witnesses and to make meaningless the language of *Robinson v. Du Vall*

(1906) 27 App. D. C. 535, 546-547, aff'd 207 U. S. 583, where it is said:

"The attesting witnesses are considered in the law as placed round the testator to protect him against fraud in the execution of his will and to judge of his capacity, and it is their duty to inform themselves of his capacity before they attest his will, and therefore these witnesses are permitted to testify as to the opinion they formed of the testator's capacity at the very time he was executing his will."

The trial court's legal premise also loses sight of the overall purpose of the Wills Act. It affords no safeguard against honest mistakes, for it must be remembered that the testator must be deemed to have adopted that which the draftsman does in fact bring back. If no evidence is available that such a mistake is made then the testator's plan or disposition is frustrated. Moving from honest mistake the rule opens the flood-gate for imposition and fraud. A no more illustrative case can be found than the one here involved. Under such circumstances fraud could be practiced with success and without detection. An unscrupulous draftsman would only have to rely on his own testimony in support and proof of the will. An adoption of such a principle would appear to give interested persons the opportunity to go into the house of a dying person and shop around for the will of their choice. It is of little moment that the draftsman may offer notes, memoranda, or even prior drafts of the will written in the handwriting of the testator to support the validity of the instrument which he offers as the last will of the testator. There is no assurance in such a situation that the notes or memoranda accurately reflect the dispositive plan of the testator as given. There is no assurance that a prior paper written in the handwriting of the testator himself accurately reflects his present dispositive intent. And it may be that a paper in the handwriting

of a testator is more misleading than oral instructions to the draftsman. It would apparently carry more weight with both the court and the jury and yet may not evidence that the paper writing did in fact contain the testator's last plan and disposition.

The rule does violence to the cardinal principle that a will by its nature is ambulatory, that is, the testator reserves the right to adopt, modify, or revoke, up until he succumbs. The operation of this rule would lead to the absurd result that though one is not bound by an attested instrument yet he may be bound by an unattested instrument. While the testator is never bound by the provisions of a duly executed will, yet by the operation of this rule one may be bound by previous instructions or documents lacking in statutory formalities, for it is said in this latter situation that this is his intent where he no longer has the power to change.

The rule of law applied in this case is impossible of application within the framework of our present law in the District of Columbia.

In the District of Columbia at least, the rule is impracticable, and its application would clearly demonstrate the danger in taking a rule of law out of its own legal climate and applying it in a different legal environment. In England the burden of proof is upon the proponent to show that the testatrix was of a sound and disposing mind. See 2 Page on Wills (Lifetime Ed. 1941) Sec. 758; 76 A. L. R. 373, 378; *Fulton v. Andrews* (1875), 7 L. R. E. & I. 448, A. C. 448, 461; *Baker v. Batt* (1838), 2 Moo. P. C. 317, 12 Eng. Rep. 1026; *Waring v. Waring* (1848), 6 Moo. P. C. 341, 13 Eng. Rep. 715; *Sutton v. Sadler* (1857), 3 C.B.N.S. 87, 140 Eng. Rep. 671. In the District of Columbia the burden of proof as to mental capacity is upon the contestants. That burden, according to the Supreme Court of the United States, is the risk of persuading the jury that the testatrix did not have the capacity to execute a valid deed or contract

at the time of the execution of the will. See *Brosnan v. Brosnan* (1923) 263 U.S. 345.

Accordingly, in the District of Columbia, the importation of this alien rule would disorientate its normal application. Under the application of this rule, what is the burden of the contestants? After the contestants show no capacity at the time of execution, then do they have the burden of proving that there was no capacity at the time of giving instructions? And, if so, where is warrant for this additional burden? If there is proof that the testatrix was mentally competent at the time she gave instructions and that she did not have mental capacity to execute a valid deed or contract at the time she signed it, who must bear the burden of showing that she recognized the draftsman, that she recalled her instructions to the draftsman, and that she assumes that the paper in her hand follows her instructions? If the burden of negating this state of mind is cast upon the contestants, is it not impossible to bear? In England, these questions are fairly simple of solution because of the burden upon the proponents to establish mental capacity, and because the so-called death-bed wills, or wills made in extremis, are suspect by the court. Are the contestants in the District of Columbia to be shackled with an unworkable doctrine?

In addition, by splitting memory, judgment and understanding to such an extent that no observing witness could reasonably appraise the testatrix' mental condition, what appears to be a rule of law in the instant case loses itself in metaphysics. When the draftsman approaches the testatrix and calls her by name and says "here is your will" and the testatrix says, "yes", has the rule been satisfied? Obviously the answer would be no. We may at this time refer to an apt illustration.

"And to illustrate these observations, an old case in time of Henry VIII, is referred to, where a monk came to a gentleman then in extremis, to make his will. The monk asked the gentleman if he would give such a manor

to his monastery? The gentleman answered yea. Then, if he would give such and such estates to such and such pious uses. The gentleman answered yea to them all. The heir-at-law observing the covetousness of the monk, and that all the estate would be given away, asked the testator if the monk was not a very knave, who answered, yea. Afterward, for the reasons above said, it was adjudged no will: Swinburne on Wills, fol. ed., p. 112." *Daniel v. Daniel*, 1861, 39 Pa. 191, 210.

There was no proper factual basis for the application of the rule of law applied in the instant case.

If in spite of the foregoing reasons this Court is of the opinion that the rule of law applied in the instant case exists, then the appellants submit that the application here was erroneous because there was an insufficient factual basis for its application. First, the alleged will was not drawn by a professional draftsman. Secondly, there was no independent evidence of the testatrix' mental capacity at the time of giving instructions. Thirdly, there was no credible evidence that the testatrix possessed that minimum degree of mental capacity required at the time of execution under the *Parker* rule.

So far as it is known, the English courts have dealt with the *Parker* rule in just six cases. In these cases the English courts have only applied the principle where the draftsman was a solicitor, or, as in one case, a notary, hence, all officers of the court, with the impeccable standards of character and honesty required by the English Judicial System. This is borne out in the strong criticism by the court of a solicitor where he had acted in a situation where he had parental interest. *Thomas v. Jones* (1928) L. R. A. C. 162. In the instant case no apparent public duty arose in the draftsman at all. The draftsman was not only a non-professional but a beneficiary under the will. Since he is not a solicitor, he failed to do that which a solicitor in England is required by law to do.

"The answer to the inquiry so raised depends on a clear view of the conduct of the Plaintiff Thomas. Not with a sole regard to his duty as a solicitor he laboured whilst the testator's powers were failing to secure a will in form advantageous to a member of his family. In a position in which his parental interests constantly influenced his action he had long interviews with the testator, professedly as a friend, of which no account could be had except his own. With accurate information of the opinion of the medical attendants as to his client's desperate condition he omitted to consult them as to the client's dispositive capacity. He moreover omitted to secure that there should be competent independent evidence of the client's capacity to execute a will." (*Thomas v. Jones*, supra, pp. 165-166.)

Implicit in all of these cases is the court's reliance on the known high character of the solicitor-draftsman. Obviously, in light of Mr. Henderson's kinship, his interest in the estate, and his testimony regarding the testatrix' physical and mental condition in the hospital from which adverse inferences could be drawn, it is difficult to see how a court could accord him this high standing.

As we have shown above, if the Thomas case is law, the English courts require independent evidence of the mental capacity of the testatrix at the time of giving instructions. There was no such independent evidence here. Under the English view there would be a serious question as to whether the proponents had maintained the burden of proving mental capacity at the time of giving instructions.

With reference to the testatrix' capacity at the time of execution, the *Parker* rule requires some minimum degree of mental capacity. It at least requires that the testatrix remember that she once gave instructions for her will, that she recognized the person to whom she gave such instruction and that she assumed the paper before her to be a will following her instructions. As we have previously observed, we are concerned with why the burden of establishing the lack of this minimum capacity under the *Parker* rule is upon

the contestant. Seemingly, the situation presented is analogous in principle to the "lucid interval" cases where the rule is that once the contestants establish general mental incompetency, the burden of proving due execution at a lucid interval is cast upon the proponents. If this rule were applied in the instant case obviously the proponents have not sustained that burden. (See 168 A.L.R. 991, citing U. S. and Maryland cases.)

On the other hand, there was evidence by Dr. Robinson, and expert testimony by Dr. Jason, that the testatrix did not even possess the capacity required under the Parker Rule. It is respectfully submitted, therefore, that the necessary factual basis for the application of the rule of law applied did not exist in the instant case.

II

The appellants likewise urge upon this court that the caveatees have not proved due execution of this will as required by Title 19, Sec. 103 of the District of Columbia Code. That statute requires that attesting witnesses attest and subscribe to the will "in the presence of said testator." Whether the District of Columbia follows the "sight" test or not (*Bullock v. Morehouse*, 57 App. D.C. 321, 19 F. 2d 705) it is quite clear "in the presence of" means something more than proximity to the testator. See 1 Page on Wills (Lifetime Ed. 1941) Secs. 352-359; Atkinson on Wills (1937) Sec. 29.

Under any standard, in order that the testatrix may insure herself that the document is her document the attesting witnesses are signing, the law has required "conscious presence" of the testatrix. Obviously, if this were not true nothing would prevent the attesting of wills of persons already dead, or persons unconscious, or persons in sick stupor, or persons asleep. In this case the evidence clearly establishes and the trial court's conclusions confirm that this testatrix was at the time of attestation in a

state of shock and near collapse so that she could not exert either body or mind. Based on an analogy to the principle applied in the "lucid interval cases"—that where the caveators establish general mental incompetence of a testator the caveatees must establish by affirmative evidence that the testator was lucid at execution—the appellants urge upon this court that under the circumstances and facts of this case the caveatees had the burden of producing affirmative and substantial evidence that the two attesting witnesses subscribed to the testatrix' will in her conscious presence. See 168 A.L.R. 991. Not only did the caveatees fail to carry this burden, but Dr. Robinson, one of the attesting witnesses, testified that neither did the testatrix request him to sign nor make any statement to him with reference to the will. And he further testified that, though present at the bedside of the testatrix at the time of execution, he did not recall any conversation that the testatrix had with Mr. Henderson or the other attesting concerning her will. (Appellants' App. 9, 10, 11). The appellants therefore submit that the caveatees failed entirely to prove due execution.

CONCLUSION

For the foregoing reasons and authorities relied upon, it is respectfully submitted that the order admitting the will of Marion E. Sabbs to probate be vacated and that this Court enter judgment for the appellants.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

No. 11,015

HENRY A. COLLINS, ET AL.,
Appellants,

v.

PAULINE DOBBINS, ET AL.,
Appellees.

APPENDIX

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CONCLUSIONS OF THE COURT

ENTERED JANUARY 22, 1950

• • • • •
 346 THE COURT: The Court is of the opinion, very,
 very strongly of the opinion that there will have to
 be a directed verdict on all issues.

• • • • •
 347 MR. THOMPSON: Very well, your Honor; we
 except.

THE COURT: Now, gentlemen, at the conclusion of the
 plaintiffs' testimony there was a motion made by the de-
 fendant for a directed verdict on all issues except the first
 one, the issue of execution.

The Court at that time denied the motion and said it was
 better for the Court not to give its reasons at that time,
 because, without reflecting on anybody, the reasons that
 the Court would have given at that time may have influenced
 the testimony. No reasons were given.

If at that time the defendants had elected to rely upon
 that motion and not offer evidence, the Court was confronted
 with this sort of a situation, that here is a dying woman
 who has lost her power of resistance, effective resistance,
 and her power of effective analysis, and was practically
 directed, as the testimony showed, to sign a paper that she
 knew nothing about.

The Court realized that there would be introduced, in
 all probability, by the defendants, the pencil memorandum,
 and that possibly the defense would rely upon the
 348 pencile memorandum, written on April 19th, and be-
 ing copied by someone at the direction of the de-
 ceased, and then handed to her in the hospital, in which
 case the Court would have directed a verdict for the plain-
 tiffs on the issue of execution, and the Court would have

told the plaintiffs that they could amend their petition of caveat by adding a paragraph to the effect that at the time of the execution of the will the deceased did not know or understand its contents.

But what was the situation and how did it develop? It developed this way: On the morning of the 7th—I am going to make this statement as a fact, because it is the testimony, uncontradicted, unchallenged, and, therefore, so far as this case is concerned, it is a fact—on the morning of the 7th E. B. Henderson was sent for by the deceased and she wanted to see him on a matter of business.

At that time her physical and mental capacities were not challenged by anybody and are not challenged by anybody.

When he got to the house, he went in the room by himself. She told him that in a certain place in the house, in a closet, underneath a box, was a pencil memorandum which she had made, and she had been told that a will written in pencil would not be a valid will, and she wanted him to reduce the contents of that written memorandum to writing with a pen. He then sat down, alongside of her, she being in bed, and he copied this pencil memorandum, section by
 349 section, reading it to her after he copied it, and asking her if that is what she wanted, and she said, "Yes."

There was essentially no difference between the pencil memorandum and the written memorandum. I think in one case there was some word substituted for another, but it did not change the sense of the memorandum at all.

Then the question of execution came up. Henderson told the deceased, "Now, here, there is nobody here to witness this will except people who are beneficiaries under the will. My understanding is that they cannot be witnesses. I am suggesting that when you get to the hospital you have it executed there and witnessed there at the hospital by people who are not interested at all in this property."

She agreed to that. And, incidentally, while I don't think the matter is of any importance, it is in the evidence that

before she was taken to the hospital she said she was going to close her eyes because she did not want to talk to anybody, and she was carried out to the ambulance and then was put in the ambulance.

Now, at some time after that, according to all the evidence, she began to have the symptoms which developed from this embolism which was definitely ascertained the following day on the performance of the autopsy.

Now, bear in mind, because this is the crux of the whole situation, the will had then been made before
 350 she ever left the house, in the sense that its terms and conditions had been finally determined by the deceased, and no mental operation was necessary in so far as any determination by her of what the terms of the will should be.

Dr. Robinson, who was one of the witnesses, says that Mr. Henderson asked him to sign the will, stating that she had signed the will, and he asked him whether or not she could execute the will at that time, a will or deed or any serious matter of business, with judgment and understanding, and he said, No, she could not, with judgment and understanding; but nowhere in the testimony at any point was it established that she could not perform the physical act of signing her name to a paper, with whose contents she was fully familiar, at a time when there was no question about her physical and mental condition.

Now, the Court has decided that the formality of execution was a burden which the evidence clearly shows could be sustained by the physical and mental resources of the deceased. It is not a case where the deceased was an idiot or an imbecile, but a case where her physical and mental resources were in a state of almost collapse, in the sense that she was not in either a physical or mental condition to exert her body and mind, but there is no suggestion by anybody that the mere formality of the execution of an instrument with which she was thoroughly familiar and

351 which, a few hours before, she had deliberately passed upon, she was not competent to do.

Now, I have lived this case for a week, and it is my nature that when I live with a thing that I live with it, and I have reached the conclusion, among these various alternatives which I have discussed orally in the case, that it would probably turn on the question as to whether or not—as to how this pencil memorandum came to be written, and how it was delivered for the signature of the deceased at the hospital, and I reached the conclusion, the very definite conclusion, satisfactory to me, that if it turned out the deceased had requested this pencil memorandum to be transcribed and had arranged for its execution at the hospital, there is nothing in the evidence that would mean that she could not go through the mechanical act of execution.

Of course, it is worth while directing your attention to the fact that one of the witnesses was asked by her to witness her will. That is not material to my finding at all, because, in so far as execution is concerned, outside of knowledge and understanding, that is clearly established anyway.

Now, of course, it did not fortify my opinion any, because I had and I have a very definite opinion, but I did make considerable research, and I am now reading from Lawyers' Reports Annotated, New Series, 618(b), pages 747 and 748, as follows:

352 "It is essential to the validity of a will that the testator know and understand the contents thereof. The knowledge must be possessed at the time of execution. It has been held, however, in the case of objections to the will on the ground of incompetency of the testator, that the testator's understanding at the time of giving instructions for the will is sufficient, although she was not competent at the time of signing it to do more than to accept the will as drawn up in accordance with her intentions."

Now, that is practically the exact situation we have here. The Court thinks he should say this on the question of

undue influence and fraud: There is no satisfactory evidence of either one. Of course, the contents of the will can only be considered as one of the possible elements in the determination as to whether or not undue influence and fraud had been exercised, but it is only of the elements, and, standing alone, it is not of sufficient weight, and it has no weight in this case because there is no possible question that after the death of the deceased's mother there arose a serious dispute over property which almost inevitably caused bad feeling, and, therefore, there is nothing in regard to the will which would suggest any undue influence or fraud.

• • • • •

354 (The jury returned to the courtroom.)

THE COURT: Ladies and gentlemen, you have listened very carefully to this case this past week, and the legal situation is this: It is undoubtedly true that at the time of the execution of this paper this lady was very sick; there is no doubt that she was in a condition of near collapse, physically and mentally, and there is no doubt that she was not in a condition to execute a serious document, such as a will or deed or contract, with judgment and understanding. But that is not the situation we are confronted with.

The undenied testimony is that in the morning she had directed her friend, Mr. Henderson, to go to a closet in her room, where she had made a pencil memorandum. She had been told that a pencil memorandum was not a good will. And then she told him that she wanted him, if he would, to transcribe this with a pen, and then she wanted to execute it. This was at a time when it is conceded she was physically and mentally capable of executing it with knowledge and understanding. Now, he sat down, alongside of her bed—and his testimony is not contradicted—and he copied this pencil memorandum which has been exhibited before you and compared by counsel, exactly, in so far as its sense was concerned, with one or two words changed, which did not

affect the sense one way or another, and the only reason that the will was not executed at the house, according to the testimony, was that it was solely because there was no one there who was not interested in the provisions of the will and who therefore could act as witnesses, and it was agreed between the deceased and Mr. Henderson that she would execute the will when she got to the hospital and could get independent witnesses, so that, as a matter of fact, the will was made before she went to the hospital, and the will was put upon that paper, that written paper, before she went to the hospital, but she had to have no real exercise of will, she had to make no decision, she had to make no analysis after she got to the hospital, because it had already been decided by her prior to that time; she only had to have sufficient physical and mental resources to be able to go through the formality of executing the will, and there is no evidence in the case that she did not have that capacity; and, therefore, the Court is compelled to direct you to find a verdict for the defendants, the cave-
 355 atees, on all the issues.

The clerk will take your verdict. Rise.

THE CLERK: Jurors, please rise.

Members of the jury, in re the estate of Marion E. Sabbs, your verdict, by direction of the Court, is as follows:

Issue No. 1:

356 "Was the said paper writing dated April 19 and May 7, 1950, purporting to be the last will and testament of Marion E. Sabbs, deceased, executed and attested to in due form as required by law?"

By direction of the court, your answer is "Yes."

Issue No: 2:

"Was the said Marion E. Sabbs at the time of making and subscribing or of the acknowledging by her of the

said paper writing of sound and disposing mind and capable of executing a valid deed or contract?"

By direction of the court, your answer is "Yes."

Issue No. 3:

"Was the said paper writing dated April 19 and May 7, 1950, obtained, or the execution thereof, or the subscription thereto, procured from the said Marion E. Sabbs, deceased, by fraud or deceit practiced upon the said Marion E. Sabbs by any person or persons?"

By direction of the Court, your answer is, "No."

Issue No. 4:

"Was the said paper writing dated April 19 and May 7, 1950, obtained, or the execution thereof, procured from the said Marion E. Sabbs, deceased, by undue influence or duress, or coercion, by any person or persons?"

By direction of the Court, your answer is, "No."

• • • • •

496 Filed Jan. 29, 1951. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Holding Probate Court

—
In Re Estate of

MARION E. SABBS, *Deceased*

Administration No. 75345
—

**ORDER ADMITTING WILL TO PROBATE
AND RECORD**

Upon motion of Counsel for the Caveatees in this case, and upon consideration of the prior proceedings herein, and it

appearing to the Court by the verdict of the jury impaneled to try the issues framed herein, that the validity of the paper writing dated April 19, 1950 and witnessed on May 7, 1950, filed in this Court, purporting to be the Last Will and Testament of Marion E. Sabbs, Deceased, was sustained, it is this 29th day of January, A. D., 1951,

ADJUDGED, ORDERED, and DECREED, That the said Will of Marion E. Sabbs, Deceased, dated April 19, 1950 and witnessed on May 7, 1950, be and the same hereby is admitted to Probate and Record as a Will of both real and personal property.

AND IT IS FURTHER ORDERED, That Letters Testamentary thereunder do issue to **HATTIE B. WATSON**, the Executrix named in the said Will, upon her giving an undertaking in the sum of three thousand Dollars (\$3,000), conditioned for the faithful performance of her duties as Executrix in this said cause.

Charles F. McLaughlin, Judge.

EXCERPTS FROM PROCEEDINGS AND TESTIMONY

• • • • •

239 Thereupon—

ALVIN S. ROBINSON

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. WASHINGTON:

• • • • •

259 Q. Doctor, in your opinion and according to your latest observation of that patient, was she in any condition to sign a will?

THE COURT: That is not the question. The real question is was she, in your judgment, in any condition to execute a will with acknowledge and understanding, that is the question. Isn't that the question?

MR. WASHINGTON: That is the question.

THE WITNESS: No, I don't think she was able to execute a will with knowledge and understanding, no.

• • • • •

Q. Now, Doctor, at what time approximately did you bring Mr. Henderson over to Marion E. Sabbs' beside.

A. It probably was around 3 o'clock or near that
260 time.

Q. Near 3?

A. Yes.

Q. Now, Doctor, did you notice or did you observe Marion E. Sabbs at that time?

A. Yes.

Q. Was there any change in her condition?

A. No, progressively getting worse.

• • • • •

264 **Q.** All right, Doctor, then what happened next, or what did you observe next?

A. Then I think he told her that he had a will to be signed and as close as I can recall he presented the last page of the will for her to sign, and I don't know whether he held the book for her to sign it on or whether I held the book or the chart or whatever it was.

Q. Now, Doctor, with reference to the statement, "I have your will for you to sign," or words to that effect, what did Marion E. Sabbs do; did she indicate in any manner a response to that?

A. I don't recall that she did anything, I don't recall any conversation that went on.

• • • • •

265 Q. Did she reach for the will or did he put it in her hand?

A. Well, she didn't reach for it, no. As I recall he must have put it in her hand.

Q. Now, Doctor, who put the pen in her hand?

THE COURT: What do you mean, pen?

MR. WASHINGTON: The pen for her to sign with.

THE WITNESS: Mr. Henderson put the pen in her hand for her to sign.

• • • • •
266 Q. Describe if you can the manner in which she signed her signature to the will.

A. Well, it was quite evident that she was struggling for muscular control; her signature was slow and more or less, shall we say hesitant as if she was trying to form the letters to the best of her ability.

• • • • •
267 Q. Now, Doctor, if you will please, place the time again, at what time or approximately what time did this alleged signing take place?

A. It must have been around between 3:10 and 3:15, in that area.

Q. And who except Mr. Henderson was behind that screen with you?

A. No one else.

• • • • •
268 Q. Did Miss Marion E. Sabbs ask you to sign the will, Doctor?

A. No.

• • • • •
269 Q. * * * Doctor, did you have any further conversation with Mr. Henderson after you signed the will?

A. As closely as I can recall he said there would have to be another witness and I said I would get the head nurse

who happened to be Mrs. Lurton to witness the signature.

Q. And what did you do, Doctor, then?

A. Then I went out into the nurse's area and called Mrs. Lurton and asked Mrs. Lurton to witness the will.

Q. What did she say in response to that request?

A. She said she would.

Q. And what did she do then, Doctor, if anything?

A. Then she came back into the ward and proceeded to Miss Sabbs' bed.

Q. Did you follow her?

THE COURT: She proceeded to Miss Sabbs' bed and what?

THE WITNESS: Signed the will.

THE COURT: Let me ask you if you can answer it, were you close enough to know whether Miss Sabbs requested her to sign this will; did you hear Miss Sabbs request her to sign the will?

THE WITNESS: No, I didn't.

272 Q. Now, Doctor, after the transaction was completed, after Mrs. Lurton signed the will, do you recall who took possession of the will? A. Mr. Henderson took possession of the will.

276 CROSS-EXAMINATION

BY MR. BRANSON:

280 Q. You had just stated that at no time did she request you to sign the will prior to adjournment for recess. Did you at any time make a statement that she acknowledged it to be her will?

THE COURT: What is that question?

MR. BRANSON: Did he at any time make that statement.

THE WITNESS: I cannot recall that I did.

THE COURT: A statement of what?

MR. BRANSON: That she acknowledged it to be her will.

THE COURT: Well, under the rules of evidence he is a will witness, you will have to give him the time, the place and the circumstances.

MR. BRANSON: June 3, 1950, in the District Court of the United States in the Register of Wills Office * * *

• • • • •
281 **Q.** Did you at that time then make a statement that you believed she was of sound and disposing mind and capable of executing a valid will, deed or contract?

A. I specifically did not make that statement.

Q. I show you this and ask you if this is your signature?

A. Yes, that is my signature.

MR. BRANSON: I now offer in evidence as a record of this court showing his previous statement and ask leave to read it to the jury.

• • • • •
283 **Q.** Now in view of that fact and having had your recollection refreshed with respect to the contents of the affidavit, do you know want to change your testimony?

A. Well when—

Q. You can answer yes or no and then explain.

THE COURT: Let him answer the question in his own way.

MR. BRANSON: We would like to have a responsive answer.

284 **THE COURT:** Let him answer the question. Proceed.

THE WITNESS: The only qualification I would make in that particular statement, as I told Mr. Shipp at the time, that he talked to me several times, that I was not going to say that this patient at that time—I was not going to say that this patient was mentally competent to under-

stand what was going on in so far as that will was concerned.

Now in so far as her muscular activity was concerned, so far as her actual signing, then I said from that particular point of view, she was able to sign, but I tried to make it as clear as I possibly could that I was not going to pass judgment on the patient's capacity from a mental standpoint.

• • • • •

309 Thereupon

ROBERT STEWART JASON

was called as a witness by and on behalf of the caveators and, having been first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

• • • • •

317 Q. Would that cyanotic condition caused by lack of oxygen in the blood affect the brain in any way?

A. Well, any person who is cyanotic is unable to function adequately, comparable to other individuals, on both
318 the physical or mental level. The bodily functions are depressed.

• • • • •

320 Q. Doctor, just one question, and then I will let you go on with the report:

Hardening of the arteries would affect the brain; wouldn't it?

A. Yes; it would.

Q. It would impair the normal functions?

A. Yes; but I would like to modify that to this extent: It depends on the degree of the hardening of the arteries and, in a sense, the degree of obstruction. This patient has things of that very nature, to have complete lack of sufficiency in one part of the brain. That was the reason for the finding which vitiated that area of the brain which had

softened, and that part of the brain which controls the fibers, the motor cortex of the brain, to supply the fibers which control the muscles at one level. Therefore, the patient must have been paralyzed before death, on the left side, so that there was hardening of the arteries to a sufficient degree to cause impairment of the brain, but that
 321 does not mean that the brain was impaired in all functions.

• • • • •

326 Q. Doctor, does the autopsy report reveal that Miss Sabbs had a stroke of some kind?

A. The pathological evidence of the autopsy evidenced a stroke some years before; how long ago I could not tell you from the gross examination.

327 Q. It is my understanding that the stroke did impair the brain tissues?

A. At that time it destroyed the brain tissues; therefore, there was complete destruction of the function on that side.

• • • • •

327 Q. I put to you this question, Doctor:

Let us assume that X, Doctor, suppose X through thirteen years prior to May 7, 1950 had suffered a stroke and was paralyzed on one side of her body and that impaired her brain, and suppose she had high blood pressure, and suppose she had a tumor, and suppose she had pulmonary embolism: would you say that a person in that condition, one hour before her death, knew what she was doing?

A. I would have to say unlikely, but there is a possibility that she might have known what she was doing.

THE COURT: Doctor, you have in your hand a complete autopsy report.

328 THE WITNESS: I do.

THE COURT: Now, from that autopsy report are you or are you not able to express an opinion as to

whether or not, on the afternoon of May 7, 1950, deceased was able to execute any important document, such as a deed, contract, or will, with knowledge and understanding?

THE WITNESS: I doubt that very seriously, your Honor.

THE COURT: What is your opinion?

THE WITNESS: It is my opinion that I do not think she could.

• • • • •

THE WITNESS: May I qualify that, your Honor?

THE COURT: Talk to the jury, please.

THE WITNESS: I have stated categorically I do not believe she could, and that is my conviction, but I want to make clear that the most important evidence in a case like this would have to come from the people who saw her at that time; but it is most unlikely that she could do anything.

May I explain what the picture was like from the autopsy findings? A person with this picture, with such marked reduction of blood going to the lungs and back to the heart and into the aorta, that would cause the blood
 329 pressure to fall down to zero, and I would like to say that a person with a blood pressure of zero, is in a bad condition, regardless of how old he is, but if a person had high blood pressure to begin with and his blood pressure falls, he is in much worse shape.

If a person normally has a blood pressure of 150 and that pressure fell down to 80, the drop there is approximately 70 millimeters of mercury. Take a person with a normal blood pressure of 120, and it drops to 80, it drops only 40, so that the degree of severity of impairment of circulation is much greater in a person with high blood pressure, and the impairment of circulation is such that it affects the body as a whole, and, therefore, if a person goes into what we refer to as shock, his muscular powers are markedly depressed, his mental powers are markedly depressed.

I have been in shock, and when I was in shock I simply wished to be left alone; I didn't want to be bothered. I could recognize somebody if I opened my eyes, and I could answer simple questions, but I could not do any reasonable thinking. That is the clinical picture of shock.

This patient, one hour before death, was such that I could not conceive of her being able to do anything which would require mental effort.

BY MR. WASHINGTON:

330 Now, Doctor, with that same picture, can you conceive of a patient being able, if a pen was placed in her hand, being able to scratch her name?

A. That depends upon what scratching her name means. If she had enough strength to hold the pen in her hand, it is possible she might be able to go through the motions.

Q. Could she respond to a suggestion by someone else to write her name?

A. She could make effort; whether she could go through with it is another question. She could make the effort.

Q. Even though she didn't have the mental capacity?

A. Mental capacity—She could make the effort if she had enough strength to do so, but that is something the clinician would have to evaluate.

Q. That would apply equally to motor capacity?

A. That is right.

Q. She could write her name and understand what she was doing?

A. I say, she might be able to; I didn't say she could. I say, the particular person who saw the patient at that time would have to answer the question. I would feel most likely she could not, one hour before death. If you carried it back four or five hours before death, that is another matter.

• • • • •

331

CROSS EXAMINATION

BY MR. BRANSON:

• • • • •

334 Q. Assuming that she asked her to sign her will or asked her to sign a paper, would that in any wise change your existing belief?

A. As I tried to indicate a while ago, I have been in shock, and I could talk, I could make a statement, but I was not able to perform any significant mental function, but I could speak. And on the same basis, that would obtain here; that person could talk.

Q. Could you identify objects and things?

A. Yes, sir; I had to identify my wife when I was in shock.

• • • • •

A. May I complete my answer?

Q. Yes.

A. When this document was given to me, in order to identify it I didn't just glance at the first page, I went through several pages to see if this was the whole document concerned. I doubt if the patient could do that, if somebody held it in front of her. She could open her eyes and glance at it. Even her vision could be impaired,

335 to the point where she could not see well; she could recognize the outlines of the paper, the handwriting, and say, "Yes; that looks like what I have seen before"; but as to the matter of going into the document and completely examining it. I doubt it most seriously that she could.

• • • • •

372 Dr. Kelley Brown, a physician and resident of the District of Columbia, was called as an expert witness by the defendants, and testifying from an inspection from

the clinical and the autopsy records; to wit, plaintiffs' exhibits Nos. 1 and 2, stated:

That it was possible for a person in shock, with zero blood pressure; as indicated by the records, to sign her name; that the effect of shock upon the body depends upon the physical condition of the person involved; that he knew of Dr. Jason and Dr. Jason had a national reputation in the profession of medicine and that he respected his opinions; that he (Dr. Brown) had attended numerous cases of shock; that the clinical record and the autopsy report indicated that Marian E. Sabbs was in shock, suffered from extreme shortness of breath and was cyanotic; that in response to a question put by plaintiffs' counsel which, after reciting the past medical history and current pathology of the decedent, specifically inquired whether such a person had the mental capacity to know and understand what she was doing, the witness' response was, viz., "Under those conditions she should have been dead."

EXHIBITS

Plaintiff's Exhibit No. 1

392

CLINICAL RECORD

Hospital: Freedman's, Register No. 71288. Sabbs (surname of patient), Marion E. (given name). Class of beneficiary —. Occupation, substitute teacher. Permanent address, 468 E Street SW. Name of nearest relative or friend, Cousin, Hattie B. Watson. Address of nearest relative or friend, 907 S Street NW (No-7636). Age of patient, 44 yrs. Date of birth, 2/2/06. Sex, female. Race, Negro. Nativity, Washington, D. C. Religion, Baptist. Length of time in this city, life. How long in United States if foreign born, —. Naturalized (yes or no), native. Date —. Legal residence, D. C. Marital state, single. Husband (or wife) of —. Father's name, Fred Sabbs (dec). Mother's maiden name, Mamie Collins (dec). Father's birthplace, D. C. Mother's birthplace, D. C. Source, PP Dr. Alvin Robinson

of —. Fibroid & partial intestinal obstruction. Date of last service, none. Authority, Dr. Alvin Robinson. Date and hour admitted, 5/7/50, 1:45 p.m. Condition on arrival, accompanied by cousin. Ward assigned, #10 GYN. 2—passes at desk. Pay Patient—Ward. Frederick S. Phillips, Admitting Officer.

Diagnosis: Fibroid, possible pulmonary infarct.

Condition on disposition, died. Date of disposition, May 7, 1950. J. Clark, Ward Surgeon.

397

CLINICAL RECORD

Post-Morten Record

Date, May 8, 1950. Ward 10. Bed _____. Weight _____. Died _____. Commenced autopsy _____ hours after death, and finished same at _____. Clinical diagnosis _____. Ward Surgeon, Dr. A. Robinson. Medical Officer in charge _____. Autopsy ordered by Dr. J. King. Permission given by _____. Performed by _____. Specimen to laboratory _____. Microscopical and bacteriological findings _____. Pathological diagnosis _____.

1. Straddling pulmonary embolis with almost complete blockage to left lung and partial collapse of lung on that side. Resulting from stasis & thrombosis of saphenous vein of left side secondary to venous obstruction caused by large (7½ month gestation) fibroid. J. King. Sabbs (surname of patient), Marion E. (given name). Register number 71288.

398 5/7/00/ HISTORY OF PRESENT ILLNESS

Approx. 13 years ago this patient had a "stroke", c paralysis of left side & partial recovery. Following this

until the present time she has had no difficulty although her family states hypertension existed. About 1 month ago she began having SOBOE and substernal pain on exertion. Her physician states that her B.P. at this time was 150/100 and has remained fairly constant since then. Following rather severe emotional upset 3 days ago SOB has increased and substernal pain more persistent. At the time of examination (1 hour before death) pt was markedly agitated.

399 Restless in bed. Quite apprehensive. Complaining of severe pain in back P=BP 0/0. No pulse. Obvious signs of shock. HR 75. Funeus not observed. Abdomen soft large fibroid. No pedal edema. Marked Cyanosis. Resp. Rate 40/mm. EG at 3 p.m. large Q3 HR 75; 3:30 p.m. marked tendency to right axis deviation c appearance of P waves and decreased prominence of Q3. HR remained 75 until death. Imp. 1. Probable dissecting aneurysm of aorta. The progressive right axis deviation may indicate pressure on pulmonary artery. 2. Pulmonary embolism can not be excluded.—Keller.

400 Pulse—36/min. Blood Pressure—0/0. Gen. Appearance. WN is a obese 53 years old, female, Cyanotic, evidently in heart failure, anxious & gasping for breath. Head—Cool, forehead pale. Eyes—Pupils constricted, react to light a little, conjunctiva pale, sclera pale. Ears—Neg. Nose—Neg. Throat—Mucous membranes pale, throat somewhat infected. Chest: Lungs: Resp. motion decreased on left side. Rales in both bases. Course breath sound. Breast—Pendulous, no masses & no tenderness. Heart—Rate 88/min. Rythm irregular. No murmurs, PMI diffuse in area of ant. ax. line. Abdomen—Large mass in

401 Rt. abdomen with some depression 3 fingers below the costal margins. This mass could also be palpated in the LLQ low just above ing. lig. It is doubtful as to whether the liver was palpable. The abdomen is obese. Genitalia Neg.

Extremities—Seem edematous, evidence of long standing

with large scars on med. surface of lower 1/3 of left leg. Pitting edema +2 bilaterally. Skin thick. Reflexes absent.

Impression: (1) Heart failure, & bilateral pulmonary edema. (2) Large fibroid. (3) Enlarged liver. (4) Prob dissecting aneurysm. Suggest O2, stimulants, fluid immediately.—Forcia.

402 CC. I have substernal pain & epigastric pain that radiates to the back. HPI. This condition dates back to 5/4/50 when pt. became immediately ill with SOBE & substernal pain and in size of abdomen. Grew progressively worse until today. When the entered hospital edematous, dyspneic & extremely anxious & cyanotic. All extremities cold & blue.

403 5-7-50

Pt. seen as soon as admitted. It was very obvious that patient's immediate difficulty was due to some path. in the chest.

Examination of abdomen revealed large tumor mass that appeared to be rising from c in pelvis. That did not appear to cause patient's trouble at this time. Medical consult. sought immediately.—Robinson.

• • • • •

407

CLINICAL RECORD

Doctor's Orders

5/7/50—(1) Admit to ward; (2) O2; (3) Nothing by mouth until ordered; (4) orthopneic position; (5) 1000cc N/S; (6) Cath for urine, note quantity & save specimen; (7) watch pt. at frequent intervals.—Forcia.

• • • • •

408

5/7/50 Sunday (Day of Admission)

1:30—Pt. admitted to ward on stretcher. No pain on admission. But severe S.O.B., approx. 40 per min. Put to bed. Head of bed slightly elevated. Dr. Forcia notified and re-

sponded. Fingernails & fingers are slightly cyanotic.—M. Tyree.

2:30—Pt. examined by Drs. Robinson, Keller, Lloyd, Swan and Forcia. Venous section done on both arms.
409 One by Dr. Robinson and the other one venous section done by Dr. Lloyd. 5000cc whole blood—started as transfusion by Dr. Lloyd. 1000cc normal saline—started as clysis by Dr. Lloyd. E.K.G.—done by Dr. Keller.

4:15—Pt. apparently ceased breathing at this time. Drs. Kellar, Lloyd, Forcia and Swan at bedside.—M. Tyree.

4:20—Pronounced lifeless by Dr. Robinson.—M. Tyree.

Plaintiff's Exhibit No. 2

375 A50—149.

1. Straddling pulmonary embolus with almost complete blockage of circulation to the left lung, which has led to partial collapse of that lung; all of which is associated with cyanosis of the nail beds and mucous membranes. The series of events appear to have begun from stasis and thrombosis of the saphenous veins resulting from obstruction to the venous return by a large uterine leiomyoma, about the size of a 7½ month gestation.

2. Large scar above the internal malleolus of the left leg which is associated with hyperpigmentation of that extremity up to the level of the knee.

3. Neprosclerosis & passive congestion of the liver.

4. Cut-downs in both antecubital fossæ.

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FREEDMEN'S HOSPITAL

NECROPSY PROTOCOL

Patient's name: Sabbs (last), Marion (first), E. (initial); Autopsy No. A-50-149; Address: 468 E Street S.W.; Attending Physician: Dr. A. Robinson; Service: 6YN; Hospital

No. 71288. Date admitted: 5/7/50, 11:45 a.m. Date of death: 5/7/50, 4:15 a.m. Date of necropsy: 5/8/50, 10 a.m. Occupation: substitute teacher. Institution —. Restrictions —. Prosector, Dr. J. King; assisted by —. Clinical diagnosis: fibroid & partial intestinal obstruction.

* * * * *

377

CLINICAL HISTORY

Chief complaint:

"I have a substernal pain and epigastric pain that radiates to the back."

Present Illness:

One month ago the patient began having SOBOE and substernal pain on exertion. Her physician states that her B.P. at this time was 150/100 and has remained fairly constant since then. Following a rather severe emotional upset on 5/4/50, SOB increased, and substernal pain became more persistent. The patient's abdomen increased in size and she became progressively worse until 5/7/50 when she entered the hospital.

At the time of examination (1 hour before death) the patient was markedly agitated and restless in bed. She was quite apprehensive and complained of severe pain in the back. Family History: None.

Past History:

Approximately 13 years ago this patient had a "stroke" with paralysis of the left side with partial recovery. Following this until the present time the patient has had no difficulty; although her family states hypertension has existed since that time.

378

ANATOMICAL DIAGNOSIS

Straddling pulmonary embolus with almost complete blockage to the left lung and partial collapse of the lung on that side; resulting from stasis and thrombosis of saphenous

veins on left side secondary to venous obstruction caused by a large (7½ months gestation) fibroid.

379 PHYSICAL EXAMINATION

General appearance: A well nourished and well developed obese 53 year old female who was cyanotic, anxious, and gasping for breath. She was evidently in heart failure.

Head: Cool, pale forehead.

Eyes: Pupils constricted, react slightly to light, pale conjunctiva and pale sclera.

Throat: Somewhat infected with pale mucous membranes.

Chest: Respiratory motion was decreased on the left side, rales in both bases. Course breath sounds.

The breasts were pendulous.

The heart rhythm was irregular with no murmurs. P.M.I. was diffuse in area of anterior axillary line.

Abdomen: A large mass was in the right abdomen with some depression three fingers below the costal margins. This mass could also be palpated in the L.L.Q. low just above the inguinal ligament. It is doubtful as to whether the liver was palpable; the abdomen was obese.

Extremities: They were edematous. Evidence of long standing with a large scar on the medial surface of lower 1/3 of left leg. Pitting edema +2, bilaterally. Thick skin.

Reflexes: Absent.

Impressions:

- (1) Heart failure with bilateral pulmonary edema.
- (2) Large fibroid.
- (3) Enlarged liver.

(4) Probable dissecting aneurysm, the progressive right axis deviation may indicate pressure on pulmonary artery.

(5) Pulmonary embolus can not be excluded.

Pulse, 80/min.; respiration, 40/min.; temperature, 98° F.; blood pressure, 0/0.

Patient was examined by Drs. Robinson, Kellar, Lloyd, Swan, and Fascia.

381

LABORATORY TESTS

Hematology—None.

Urinalysis—Sugar negative; acetone +2; albumen +3.

Progressive Notes: Patient was placed in orthopnea position in Ward 10.

Suggestions of Dr. Forcia: O₂, stimulants, fluid immediately. Venous section after examination: 500cc whole blood, 2:30 p.m.; 1000cc normal saline, 2:30 p.m.; E.K.G. by Dr. Keller; 3 p.m., large Q3 H.R. 75; 3:30 p.m., marked tendency to right axis deviation & disappearance of P wave decreased prominence of QR.

The patient showed no improvement and apparently ceased breathing at 4:15 p.m. 5/7/50. Dr. Robinson pronounced the patient lifeless at 4:20 p.m. 5/7/50. The heart rate remained 75 until death.

• • • • •

382

EXTERNAL EXAMINATION

Development, well; Nourishment, obese; race, N.; Sex, female; Apparent Age, —; Length, 61 in.; (Est.) Weight, 200 lbs.; (Est.) Rigor Mortis, present; P.M. Lividity, deepened; Cyanosis, present (marked in nail beds); Mucous Membranes, cyanotic; Edema, none; Jaundice, none; Ulcers, none; Scars, 3A; Hemorrhage, none; Pigmentation, brown—3D; Clubbing, 0; Trauma, 3B; Identification Marks, 0; Local Tumors, 3C.

• • • • •

Peritoneal Cavity—Panniculus adipasses 6.3 cm; surfaces —; fluid —; gas —; diaphragm (R) 3rd rib, (L) 4th interspace; liver (MCL) — cms.; relation of organs —.

• • • • •

Pleural Cavities: Surfaces—; contents, 10cc amber colored fluid (left); 5cc of amber colored fluid (right).

• • • • •

Pericardial Cavity: Contents, 10cc amber colored fluid.

383 3A. Scar measuring 9cm vertically, 6cm transversely just above left internal malleolus, surrounded by area of hyperpigmentation. 3B. Two cut-downs, one on each antecubital fossa measuring $4\frac{1}{2}$ cm in length, enclosed by 4 interrupted B.S.S. 3C. There is a large abdominal mass, size of $7\frac{1}{2}$ or 8 month gestation which apparently arises from pelvis. 3D. Some discoloration over lower half of left leg including the foot.

384

SYSTEMS

Vascular: Heart Wt., 350 Gms.; size, 0; Ext. surface, nothing significant; Rt. atrium —; Lt. atrium —; Rt. Vent. 5 mms.; Lt. Vent. 12 mms.; T.V. 10 cms; —P.V. 7 cms; M.V. 8.5 cms; A.V. 6 cms; Fossa Ovalis, closed; Septum, —; Coronary vessels, patent.

RESPIRATORY—4A

Lungs (Ext. Surfs., Cut Surf., Bl. Ves., Alterations.) Rt. Wt. 550 gms.; size, small, shows hypostatic congestion, cut section of Rt. lower lobe shows edema and congestion. Lt. Wt. 370 gms.; size, small, floats in water, shows congestion on posterior & diaphragmatic surface.

385 4A. In cavity of Rt. ventricle there was an unattached clot that appeared to be covered by thrombus.

There is a small firm verrucous on the free border of cusps from which its coronary arises.

Saddle Embolis: Located at bifurcation of pulmonary artery which in its extent to the left seemed to almost com-

pletely block the artery and extends to include all the major branches of the artery.

On the right side the extent is similar, however the obstruction is less complete. The portal vein was opened to reveal a small (unattached) embolus just above the junctures of the common iliacs. Small fragment of embolic material were revealed on dissection of the femoral vein on the left side. The dissection was made for 20cm in length just below the inguinal ligament.

• • • • •

386 Digestive: Esophagus, —; Stomach: Size —; contents, 150cc of partially digested material; wall—; Mucosa, partially congested; Alterations, slightly dilated; Duodenum, ampulla is patent; Small Intestine—; Appendix—; Large Intestine—; Spleen: Wt. 130 gms., consistency, mottled appearance (firm); capsule, not unusual; cut surface, not unusual on cut surface; Pancreas: Wt. — gms., alteration, not unusual; Liver: Wt. 1925 gms., size —, shape, normal; Ext. surfaces, smooth; cut surface, nutmeg appearance; vessels —, alterations —; Gall Bladder: size —, external surface 0, contents, 30cc of viscid dark bile; wall —, ducts —.

• • • • •

387 Urinary — Kidneys: (Wt. Consistency, Capsule, Ext. Surface, Cut Surfaces, Cortex, Medulla, Pelvis and Calyces, Bl., Vessels). Left (similar), Wt. — gms. Marked dilatation of ureter, pelvis, calyces. Renal parenchyma 1.2 cm. Right: Wt. 160 gms. Capsule strips with difficulty, scarred & pitted, slightly granular appearance. Medulla—1.5 cm. On cut surface small papillary like growth at base of pyramid projecting into calyx. Ureter: Size —. Course to Bladder. Alterations: Marked dilatation on left.

• • • • •

Female Organs of Generation—Uterus: Size 23x15x18.

388 Ovaries: Alteration: Tubes and ovaries are mal located with left appearing anteriorly & right posteriorly but do not appear unusual otherwise. Vagina: —.

Endocrine—Adrenals (Size, Cortex, Medulla): not unusual.

Nervous System—Head: Scalp —, skull —, meninges —; Brain: Wt. 1325 gms. Ext. Surface: slight congestion over hemispheres, slight depression 2cm in greatest measurement in central Sylvian fissure, similar depression on right parietal region.

389 GROSS TISSUE RECORD SHEET

Plugs Cut from Organs—Heart, section 2; aorta, —; right lung, section 2; left lung, section 3, including portion of thrombus; spleen, section 1; pancreas, section 1; liver, section 1 * * * Others, clot from rt. ventricle.

390 A50—149

The brain is of normal size $\bar{c}$ some atrophy over the para-sagittal motor area and sensory area and corresponding to the foot area on both sides. In Broca's area on the right, there is some slight degree of softening to the finger. There is no evidence of atrophy of frontal lobes.

The vessels at the base show only a mild degree of arteriosclerosis. The circle of Willis appears normal. No cerebellæ or temporal cones present.

Coronal section of the brain shown in a section appears 2cm behind tip of temporal lobe reveals in the right side softening in the region of the Isle of Reil. The greatest

width is 2.5 cm and vertically 4cm. There is destruction of the external capsule and atrophy of the cordate nucleus and also of the fibres of the internal capsule. As a result of this atrophy there is retraction of the lateral ventricle (internal hydrocephalus).

Other sections are essentially negative.

Sections through the cerebellum reveals no dilatation of the 5th ventricle and no hemorrhage.

Sections: Isle of Reil, Lenticular Nucleus, High Cervical, Cerebellum. Stain: H & E, nissls, astrocytes.

Impression: Encephalomalacia. Right Internal hydrocephalus (Hydrocephalus exvacuo). EYW/US.

**BRIEF AND ADDITIONAL APPENDIX
FOR APPELLEES**

IN THE
UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
No. 11,015 *District of Columbia Circuit*

FILED NOV 16 1951

HENRY A. COLLINS, ET AL.,
Appellants,

v.

PAULINE DOBBINS, ET AL.,
Appellees.

Joseph W. Stewart
CLERK

Appeal from the United States District Court for the
District of Columbia

AMBROSE SHIEF, JR.,
1408 Hopkins Street, N.W.
OTHO D. BRANSON,
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WENDELL R. SHIEF,
1317 R Street, N.W.
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Attorneys for Appellees.

No. 11,015

QUESTIONS PRESENTED ON THIS APPEAL

- I. Whether the evidence fully justified the ruling of the trial Judge in granting the motion of the caveatees for a directed verdict on all of the issues framed.
- II. Whether the proof of the *factum* of the will was sufficiently established, and the trial Judge was without error in his refusal to submit this issue to the jury.

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PAULINE DOBBINS, ET AL.,
Appellees.

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEES

COUNTER STATEMENT OF THE CASE

The appellants' statement of the case is so incomplete that appellees deem it essential to file a more complete, and therefore more accurate, summary as follows:

This was an action, commenced in the court below, through caveat proceedings, contesting the will of Marion E. Sabbs, deceased. The caveators, appellants herein, are all first cousins of the testatrix, while the caveatees, appellees herein, are more distant cousins and close friends of the testatrix. It is without question that after the death of the mother of the testatrix there arose a serious dispute over

property which almost inevitably caused bad feeling between the caveators and the testatrix (App. App. 5),* and resulted in civil action No. 931-50, still pending in the court below.

The issues framed in the court below by the caveators were: (1) due execution of the will, (2) testamentary incapacity, (3) fraud, and (4) undue influence. The caveators were designated parties plaintiffs, and the caveatees were designated parties defendants. Appellants have abandoned the issues of fraud and undue influence on this appeal.

A jury was impaneled before the late Judge T. Alan Goldsborough on the 15th day of January, 1951. On January 22, 1951, after six days of trial, at the conclusion of all the evidence, upon motion of counsel for the appellees, the lower court directed a verdict for the appellees on all issues framed (App. App. 6). On January 31, 1951, appellants filed a motion for judgment or a new trial. On February 14, 1951, the trial Judge denied the motion and signed an order accordingly. The appellants noted their appeal to this court on February 21, 1951.

When O. H. Frost, the court reporter, died on April 7, 1951, approximately only three-fourths of the trial testimony had been transcribed. Pursuant to an order of this court, dated June 13, 1951, the untranscribed evidence was narrated by the appellants. Appellees filed proposed amendments to appellants' narrative statement on June 23, 1951, in the lower court, but when appellants refused to amend their narrative statement, the appellees, in order to expedite matters and preclude any additional application to this court for further instructions, agreed to accept appellants' narration as filed. On August 2, 1951, the lower court signed an order settling and approving the appellants' narrative statement of the untranscribed evidence.

Marion E. Sabbs, born in Washington, D. C., was a grad-

* References to Appellants' Appendix are indicated by "App. App." References to Appellees' Additional Appendix are given as "Add. App."

uate of Dunbar High School, Miner Normal School, and Howard University, and taught in the public high schools of Baltimore, Maryland, for 15 years. She was stricken with partial paralysis that affected her left arm and left leg in 1936. Subsequently, she taught as a substitute teacher in the public schools of the District of Columbia through the month of March, 1950. She was 43 years of age, unmarried, and a person of strong will power.

On the 19th day of April, 1950, she wrote in her own handwriting a lead-pencil memorandum disposing of all of her real and personal property, in 16 different bequests and devises (Def. Ex. No. 3, Add. App. 93-95). On the morning of May 7, 1950, she summoned to her bedside her cousin and trusted friend, Dr. Edwin B. Henderson, and told him that in a closet, underneath a box, was a pencil memorandum which she had made; that she had been told that a will written in pencil would not be a valid will, and she wanted him to reduce the contents of that written memorandum to writing with a pen. He then sat down, alongside of her, she being in bed, and he copied this pencil memorandum, section by section, reading it to her after he copied it, and asking her if that is what she wanted, and she said "Yes." In this copying there were two minor, immaterial changes. In all other respects the two documents are identical. These minor changes were called to the attention of the testatrix at the time and approved by her. When he completed the copied document Dr. Henderson told the testatrix "there is nobody here to witness this will except people who are beneficiaries under the will. My understanding is that they cannot be witnesses." Dr. Henderson then suggested that she wait until she got to the hospital and have the will witnessed there by people who were not at all interested in her property. (Appellants' App. 2.)

It is true that at the conclusion of all the evidence the late Judge T. Alan Goldsborough directed a verdict for the caveatees on all issues framed. However, Judge Goldsbor-

ough did not find, as stated in appellants' statement of facts, "that at the time of execution on the afternoon of May 7, 1950, the decedent did not have the mental capacity to execute a valid will, deed, or contract." (Appellants' Brief 2). On the contrary, the late Judge Goldsborough did say, and we quote, "but nowhere in the testimony at any point was it established that she could not perform the physical act of signing her name to a paper, with whose contents she was fully familiar, at a time when there was no question about her physical and mental condition."

"Now, the Court has decided that the formality of execution was a burden which the evidence clearly shows could be sustained by the physical and mental resources of the deceased. It is not a case where the deceased was an idiot or an imbecile, but a case where her physical and mental resources were in a state of almost collapse, in the sense that she was not in either a physical or mental condition to exert her body and mind, but there is no suggestion by anybody that the mere formality of the execution of an instrument with which she was thoroughly familiar and which, a few hours before, she had deliberately passed upon, she was not competent to do." (Appellants' App. 3, 4).

The clinical record of Freedmen's Hospital shows that the testatrix was admitted to Ward 10 by Nurse Maizine Tyree at 1:30 p.m., that there was no pain on admission, that there was a severe shortness of breath; that she was put to bed, that head of bed was slightly elevated, that Dr. Forcia was notified and responded; that her fingernails and fingers were slightly cyanotic. That at 2:30 p.m. the patient was examined by Drs. Robinson, Keller, Lloyd, Swan, and Forcia; that as a result of the examination the patient was treated by Drs. Robinson, Lloyd, and Keller. (Appellants' App. 21, 22).

Nurse Tyree, subsequent to the death of the testatrix, and prior to the trial, joined the Armed Forces, and it was necessary to take her deposition. Her deposition was read

into the record by the caveatees. She stated in her deposition that it was 3:30 p.m. when the doctors began administering medication to the testatrix (Add. App. 87). She stated that the testatrix was not painful on admission, that she was suffering only from shortness of breath; that the testatrix asked her to adjust her in bed so she would be more comfortable; that the testatrix told her that she did not think she could move her by herself—but she was able to—because she told her that it didn't seem that she should be a graduate nurse; that she looked too young. (Add. App. 84). The testatrix answered all questions put to her by Miss Tyree (Add. App. 80). Miss Tyree stated that the testatrix was rational upon admission (Add. App. 84); that she heard the testatrix ask head nurse Betty Lurton to witness her will, and that she heard the testatrix say that it was her will (Add. App. 82); that the will was executed within 45 minutes from the time the testatrix was admitted to Ward 10. (Add. App. 84); that the testatrix was of sound and disposing mind at the time of the execution of the will (Add. App. 84); that the testatrix's case was not an emergency case; that an emergency case on Ward 10 would be a case of ectopic pregnancy (Add. App. 89).

Appellants' statement of facts (Appellants' Brief 5, 6) is incorrect relative to Dr. Forcia's report and its revelation "that *on admission* the patient complained of pain in the chest; that patient was 'evidently in heart failure', was 'gasping for breath', was 'extremely anxious' and cyanotic with all extremities 'cold and blue' ", since there is nothing in the report of Dr. Forcia to indicate the report refers to the time that the patient was admitted to Ward 10. But there are these factors about the report itself that show it has no reference to the time the testatrix was admitted to Ward 10: (1) the writing of admission notes is a function of the nurse in attendance; (2) Clinical Record shows that patient was admitted to Ward 10 at 1:30 p.m.; no pain on admission (Appellants' App. 21); (3) the blood pressure

was taken by Dr. Keller at 3:20 p.m., and it recorded 0/0 (Appellants' App. 20), and nowhere in the entire record is it shown that any blood pressure was taken and recorded before 3:20 p.m.

It is very evident from the admission of Dr. Swan that the main thing he did while in attendance was to try to cut into the veins of the patient in order to start a fluid (Add. App. 73). Dr. Swan was not present when the will was executed and knows nothing about the execution of the will (Add. App. 78). Dr. Swan states that the patient registered no blood pressure when he first tried to take it; but he also states that Dr. Keller and Dr. Robinson were at the bedside at the time (Add. App. 70), all of which shows that the testimony of Dr. Swan related to a period *subsequent* to the execution of the will, since it is conceded by Dr. Robinson that Dr. Keller was not in attendance until *after* the execution of the will (Add. App. 3). Dr. Swan testified further that after he had made many attempts to get into the patient's veins, which took about 30 minutes, he was joined by Dr. Robinson and Dr. Keller; that they were attempting to start some fluid on the patient; that Dr. Keller took an "ekg" tracing (Add. App. 70). Dr. Swan was substantially in attendance from this time until the death of the testatrix (Add. App. 70). The hospital record shows "EKG." by Dr. Keller, at 3:00 p.m. and 3:30 p.m. (Appellants' App. 20, 25).

The testimony of Dr. Alvin Robinson, the attending physician and attesting witness, was a series of contradictions. When asked whether the testatrix was in a position, physical or mental, to make a will, he said he could not answer that question yes or no (Add. App. 9); when asked whether the testatrix was in any condition to execute a will with knowledge and understanding, he answered that he did not think that the testatrix was able to execute a will with knowledge and understanding (Add. App. 27). He stated that the patient was in excruciating pain from the time she came in until her demise. (Add. App. 7). In subsequent

testimony, Dr. Robinson, replying to a question concerning the condition of the patient at the time of the execution of the will, said he could not say that she was still having pain, as it may have abated somewhat at that time; that her reaction was not as great as it had been (Add. App. 30). Upon being asked whether the patient was receiving any medication at the time of the execution of the will, Dr. Robinson's testimony was most conflicting: first, he said the patient's condition was such that she was placed under nasal oxygen (Add. App. 5); secondly, he said, that they had not started the oxygen therapy on her, and that they had not started the saline solution on her (Add. App. 28); thirdly, upon being asked was she receiving any type of medication at 2:15 p.m., he said, no, she was not receiving any type of treatment at that time (Add. App. 23); fourthly, when asked whether the oxygen was in use before or after the execution of the will, he replied, "No, my recollection is we had started the oxygen" (Add. App. 45). When asked whether the setting up of the clyses and the intravenous injections were done after the execution of the will, he said, yes, to the best of his recollection (Add. App. 45).

The appellants' statement of facts (Appellants' Brief 7) states that Dr. Henderson first approached Dr. Robinson about 2:30 p.m. concerning the execution of the will; but it failed to state that at 2:30 p.m. the patient was being examined by Drs. Robinson, Keller, Lloyd, Swan, and Forcia, according to the hospital record (Appellants' App. 22), and a venous section was done on both arms—one by Dr. Robinson—in order to start the blood transfusion and the saline injection (App. App. 22, 25). The said statement of facts (Brief 7) further states that Dr. Robinson took Dr. Henderson to the bedside of the testatrix around 3:00 p.m. Appellants admit that Dr. Keller performed an "E.K.G." (electro-cardiograph tracing) on the patient at 3:00 p.m. (Brief 8, App. App. 20, 25), tacitly stating that the will was being executed at the same time that Dr. Keller was con-

ducting his "E.K.G." But the statement of facts of the appellants failed to inform the Court that Dr. Robinson testified that Dr. Keller was not in attendance on the testatrix until *after* the execution of the will. Notwithstanding the foregoing, the statement of facts admits that *only* Dr. Henderson and Dr. Robinson were at the bedside of the testatrix at the time the testatrix and Dr. Robinson signed the will (Appellants' Brief 8).

Dr. Robinson testified that when Dr. Henderson asked him whether the testatrix was able to sign the will, he told him that in a little while he thought she would be able to do so (Add. App. 26); previously, Dr. Robinson had testified that Dr. Henderson requested permission of him to see the testatrix and that he told Dr. Henderson that he would have to see how the patient was getting along before he permitted him to see her; and that after he had seen the reaction of the patient, he permitted Dr. Henderson to talk with her (Add. App. 8).

Dr. Robinson testified that at the time of the execution of the will no life fluid or saline had been injected into the patient (Add. App. 23). The records from the hospital show that shortly after 2:30 p.m., 1000cc normal saline was injected into the patient (Appellants' App. 22, 25).

Dr. Robinson in his testimony has given four different versions as to the time the will was executed. He stated, (1) that it was executed at 3:00 p.m. (Add. App. 27); (2) that it was between 3:10 and 3:15 p.m. that the will was executed (Add. App. 32); (3) that the patient died at 4:30 p.m. and that the will was executed one hour before the death of the testatrix (3:30 p.m.) (Add. App. 36-37); and (4) that he did not know what time the execution of the will was completed (Add. App. 34).

Dr. Robinson further testified that the patient was conscious at the time of the execution of the will (Add. App. 9); that on June 3, 1950, he appeared before a deputy register of wills of the District Court and made oath to the following

statement: "that the testatrix signed the will in his presence, that the said testatrix published, pronounced, and declared the same to be her last will and testament and at the time of so doing said testatrix was to the best of affiant's apprehension of sound and disposing mind and capable of executing a valid deed or contract" (Add. App. 40-41). He also testified that Dr. Henderson spent 20 minutes at the bedside of the testatrix for the purpose of having the will executed (Add. App. 4). On one occasion while under cross-examination Dr. Robinson was asked whether he now cared to change his opinion as to the testatrix's capacity to execute a will, after his admission of the proceedings in the office of the deputy register of wills, and he said that he had already stated that he would not pass judgment on the patient's capacity from a mental point of view, but insofar as her muscular activity was concerned, so far as her actual signing, she was competent to sign (Add. App. 41).

The statement of facts of the appellants fails to give an accurate analysis of the testimony of Head Nurse Betty Lurton on Ward 10. Mrs. Lurton was one of the attesting witnesses. She testified that the testatrix requested her to sign her will as a witness after she had been summoned to the bedside of the testatrix by Dr. Robinson (Add. App. 51); that the testatrix at the time was sitting at an angle of about 45 or 60 degrees; that there was a back rest; that there was no medication being given the testatrix at the time (Add. App. 50(a)); upon being asked by the Court what time she signed the will, she said, "it was about 3:00 o'clock, I am not certain, we were screened off, probably a little before that." (Add. App. 50(a)); she testified that Dr. Keller was not there at the time she signed the will; that nurse Tyree was at the bed doing something, exactly what she did not know (R. 70); that the testatrix very definitely acknowledged it to be her will by saying, "I wish you would witness the signature of my will" (Add. App. 51); that the testatrix was under her observation from the time she ar-

rived in the hospital (Add. App. 54); that she held conversations with the testatrix, and that the testatrix definitely understood what was going on; that during her career she observed over a thousand patients; that from her observation of the patient she was of sound mind at the time of the execution of the will (Add. App. 55); upon being asked, while a witness on the issue of testamentary capacity, what time of day she signed the will, she said, "after refreshing my recollection I would say it was 2:20 rather than 3:00 o'clock" (Add. App. 55); that the oxygen and clyses were administered to the patient after the execution of the will; that Dr. Swan was not present when the will was executed (Add. App. 55); that the zero blood pressure found at 3:20 p.m. means that the doctors could not find a blood pressure by normal methods (R. 304).

The testimony of Dr. Robert S. Jason revealed that he was pathologist at both Freedmen's Hospital and Howard University Medical School. He never saw the testatrix during her lifetime. He predicated his opinion upon the clinical and autopsy records. His testimony consisted largely of the reading and explanation of the medical record. Responding to a hypothetical question based on the physical condition of the testatrix at 3:20 p.m., relative to the ability of the testatrix to execute a will with knowledge and understanding, he said that it was unlikely, but there was a possibility that she might have known what she was doing (Add. App. 61). Upon direction from the Court he was asked to give an opinion based on the autopsy report, and he replied, "I doubt that very seriously, your Honor." (Add. App. 62). The Court, insisting upon a positive opinion from the Doctor, inquired: "What is your opinion?", and the Doctor replied, "It is my opinion that I do not think she could." The Doctor asking to explain his opinion, stated that the most important evidence must come from the people who saw her at the time, but it is most unlikely that she could do anything (Add. App. 62). The Doctor

assuming that the will was executed one hour before death, said, "this patient one hour before death, was such that I could not conceive of her being able to do anything which would require mental effort" (R. 329). When asked whether she could write her name and understand what she was doing, the Doctor replied, "I say, she might be able to, I didn't say she could. The particular persons who saw the patient at that time would have to answer the question." (Add. App. 63). On cross-examination he was asked whether she could execute a will or attend to important matters; he replied, "I don't think she could, one hour before death" (Add. App. 63); "that if someone handed her a paper she could recognize the topographical outlines of the paper, and if someone went over it with her she could recognize that as something she had seen before. She might be able to recognize it completely; that would depend on how her mental attitude would be at that time." (Add. App. 66). When asked would the patient know who her relatives were, he said, "Yes"; when asked whether she would know pretty well what property she owned, the Doctor said, "If she had to transfer property she could not remember all of her property, but she might be able to remember the basic facts, but not details"; that if she were going to give her property away she would most likely know what she intended to do. (Add. App. 66). When asked by the Court whether or not she would have sufficient judgment and understanding to know who were, in her opinion, the proper objects of her bounty, and discriminate as to what her judgment should be in connection with them, he said, "If the patient had made up her mind before hand what she wanted to do, my guess would be, my conviction would be, that she would still have some knowledge as to what she wanted to do." (Add. App. 67); that the paralysis that the testatrix had did not affect the thinking part of her brain, because that is in the front of the brain (Add. App. 68).

Dr. Kelly Brown, an expert in internal medicine, was

called as a witness for the appellees, and gave an opinion that one suffering from shock was able to sign her name; that the effect of shock upon the body depends upon the physical condition of the person involved (Appellants' App. 18).

SUMMARY OF ARGUMENT

I. The testatrix executed her will less than three hours after she had personally directed and approved the copying in ink of her own pencil-written memorandum. There were 16 bequests and devises in the penciled memorandum, and the same bequests and devises in the executed will. Both the penciled memorandum and the executed will disposed of all the property of the testatrix. The penciled memorandum was written 18 days prior to the date of her demise.

It is the contention of the appellees that at the time of the execution of the will the testatrix was possessed with testamentary capacity; that she was fully conversant with the provisions of the will, the provisions of which she was the original author; that at the time of execution of the will she possessed more than the smallest capacity to understand what she was doing and to determine intelligently whether she would do it.

It is the further contention of the appellees that the record is void of any substantive evidence on the issue of testamentary incapacity; that the appellants, who have the burden of proof on the issue of mental incapacity, have failed to sustain that burden; and that in the light of the uncontroverted evidence of testamentary capacity, the trial Judge was without error in his refusal to submit to the jury the issue of testamentary incapacity.

II. The evidence in the record shows beyond question that proof of the factum of the will was duly established. It shows that Dr. Henderson along with Dr. Robinson went to the bedside of the testatrix on Ward 10 at Freedmen's Hospital; that the testatrix spoke to Dr. Henderson, saying,

"Hello, Ed"; "what are they going to do with me here?"; that Dr. Henderson told her that he had her will and she nodded, whereupon the testatrix signed the will in the presence of Dr. Robinson, who saw her sign, and then Dr. Robinson signed the will. Dr. Robinson then went out into the ward and procured the head nurse, Betty Lurton, and brought her to the bedside of the testatrix. The testatrix requested Mrs. Lurton to sign her will as a witness, whereupon Mrs. Lurton signed the will. In view of the foregoing, and the application of law of this jurisdiction, proof of the factum of the will was fully established.

ARGUMENT I

A. The Appellants Have Misconceived the Basis of the Ruling of the Lower Court

Inasmuch as the appellants are insistent in their contention that the ruling of the lower Court, in its binding instructions to the jury, violated the rule of law relative to testamentary capacity, we deem it advisable to set out, in *haec verba*, the salient portions of the language used by the trial Judge at the time. After relating to the jury the unchallenged and uncontroverted evidence in the case, the trial Judge said:

"... so that, as a matter of fact, the will was made before she went to the hospital, and the will was put upon that paper, that written paper, before she went to the hospital, but she had to have no real exercise of will, she had to make no decision, she had to make no analysis after she got to the hospital, because it had already been decided by her prior to that time; she only had to have sufficient physical and mental resources to be able to go through the formality of executing the will, and there is no evidence in the case that she did not have that capacity; and, therefore, the Court is compelled to direct you to find a verdict for the defendants, the caveatees, on all the issues." (Appellants' App. 6.)

The argument of counsel for appellants, to the effect that the trial Judge held that testamentary capacity may be determined at the time the testatrix gave instructions for her will rather than at the time of execution, is not borne out by the language of the trial Judge. The decision of the lower court enunciated no new proposition of law. The issues presented on this appeal offer no questions of novel impression. The decisions supporting the ruling of the trial Judge, as we will hereinafter analyze, are as old and as deep-seated as our system of jurisprudence itself. Let us first consider and unfold the inapplicability of the cases cited by the appellants in support of their arguments. Inasmuch as the English and Canadian cases cited by appellants are discussed in appellees Argument Number I-D, no analysis will be made here of same.

Counsel for appellees do not contend that testamentary capacity should not exist at the time of the execution of the will, but state that the real issue is: "Testamentary capacity at the time of giving instructions for the will affects the measure of capacity which must exist at time of execution", and that the burden of proof is upon the caveators to show by clear and satisfactory evidence the lack of capacity at the moment of the execution of the will. Such was the ruling of the Court in *Bell v. Wolfkill*, 152 Md. 407, 137 A. 35, cited by appellants on page 19 of their Brief.

In the case of *Thompson v. Smith*, 70 App. D. C. 65, 103 F. 2d 936, cited by appellants (Brief 20), the decision goes much further than disclosed by appellants. The court observed:

"... that the rule is no less stringent on the lack of mental capacity. The question of the mental capacity of an aged or feeble person to dispose of her property is not whether or not the powers of her mind have been impaired or whether or not she had ordinary capacity to do business, but it is whether or not she had only the smallest capacity to understand what she was doing and to determine intelligently whether she would do it. ...

Any other test would wrest from the feeble and aged that power over their savings which is their best safeguard against misfortune and produce unrest, uncertainty, and litigation."

The court cited with approval *Gibson v. Collins*, 55 App. D. C. 262, *Certiorari denied*, 267 U. S. 605, *Barbour v. Moore*, 4 App. D. C. 535, and *Lyon v. Townsend*, 124 Md. 163.

The above cases along with the case of *Keely v. Moore*, 196 U. S. 38, cited by appellants (Appellants' Brief 21) stress two things: (1) That neither sickness, old age, infirmities, feebleness, or the lack of a perfect memory will deprive a person of the capacity to make a will; and (2) That the party assailing the will is not relieved on account thereof of the necessity of establishing by clear proof, the existence of mental incapacity at the time of executing the paper.

The appellants (Brief 22) contend that the ruling of the trial Judge violates the decisional law of the District of Columbia and Maryland, and cite *in re Will of John Hoover*, 8 Mackey (19 D. C.) 495 at page 508 (Brief 22, 23). The history of the Hoover case, *supra*, shows that a caveat was filed to the will of John Hoover who was 93 years of age at the time of execution. The issues were submitted to a jury whose verdict was in favor of the caveators. This verdict was set aside by the trial court. An appeal was taken to the general term court, which court affirmed the ruling of the trial court. (See 7 Mackey 551). The court in affirming the ruling of the trial court said:

"All presumptions of law are in favor of a will unless the incompetency of the testator is very satisfactorily shown."

"... every intendment should be in favor of the action of the trial Judge, who was in a better position to judge the evidence than the appellate Justices."

At the conclusion of the second trial the jury again found for the caveators and an appeal was again taken to the General Session Court, this time by the caveatees; and the court

again affirmed the ruling of the trial court, stating in addition to what the appellants have quoted (Brief 22-23), as follows:

“We do not mean to say that the evidence shows Hoover had really entertained for a long time the persistent intention to devise and bequeath his estate for religious or charitable purposes, as was claimed by the caveatees, such an intention seemed inconsistent with other reported declaration as to his purposes.”

The appellants (Brief 23) state that there appear to be no reported decisions from Maryland on the question in issue in this case. This is an incorrect statement of fact. The case of *Cramer v. Crumbaugh*, 3 Md. 491 (1853), in which three leading English cases were cited, is very much in point and is discussed in appellees Argument I-D. The case of *Acker v. Acker*, 172 Md. 477, is substantially on all fours with the case here on appeal, and is discussed at length in appellees Argument I-B-1.

The appellants cite the case of *Struth v. Decker*, 100 Md. 368 (Brief 23) in support of their contention that the Court of Appeals of Maryland had an opportunity to enunciate the doctrine of previous instruction for preparation of a will would lessen the standard of mental capacity at the time of execution. The *Struth v. Decker* case, *supra*, discloses factually that the testator gave instructions for preparation of his will at 10:00 a.m., February 25th; the will was prepared and presented for execution at 12:00 noon, and the will was signed and witnessed at that time. The attending physician testified that he saw the testator at 7:00 a.m. and that he was not competent to execute a will at that time; that he saw him at 10:00 a.m. again and from that time on it was utterly impossible for him to execute a will. The only subscribing witness who was available to testify, stated the testator did not have the capacity to execute a deed or contract, and that at the time she witnessed the will she thought she was witnessing his signature and not his will. The

caveatees offered abundant evidence of testamentary capacity. The testator died the following morning. The issues were submitted to the jury and the verdict was for the caveatees. An appeal was taken and the case was affirmed by the Maryland Court of Appeals.

In the case of *Grill v. O'Dell*, 113 Md. 625 (Brief 23-24) cited by the appellants, the jury found for the caveators and on appeal the verdict was sustained.

The appellants cite the case of *Aurand v. Wilt*, 9 Pa. 54, (Br. 26) and assert that the principle was examined and repudiated. But such is not the fact. The Will Act of 1917 of the State of Pennsylvania, Section 181, provides in part:

“Every will shall be in writing, and unless the person making the same shall be prevented by extremity of his last sickness, etc.”

This provision was in the Pennsylvania Statute at the time of the decision in *Aurand v. Wilt* case, *supra*. The evidence disclosed that at the time of giving instructions for preparation of the will the testator was competent, but at the time of execution the testator was unconscious, in a coma, and could not be aroused. The question before the court was whether the will was entitled to probate because he was prevented from signing the will by the extremity of his last sickness. The will was never signed. The court held:

“If at the time, or before it is completed, he either dies or ceases to be able to act understandingly, it cannot be admitted to probate.”

The case of *In re Lewis Estate*, 364 Pa. 225, referred to by appellants (Brief 26), presented conflicting evidence on the issue of testamentary capacity, and the Appellate Court held that a D. V. N. should issue in order that a trial thereon may be had.

The contention of appellants that the State of Pennsylvania has repudiated the doctrine as laid down in *Parker v.*

Felgate, L. R. 8 Prob. Div. 171 (Brief 26), is not sustained by the decisions of that state. In *McMaster v. Blair*, 29 Pa. 298 (1857), the court said:

“Very often a disposing mind needs very little power of reflection, because it has very little to reflect about. The work of reflection has been performed before, and when the time for making the will comes, memory alone is wanted in order to dictate the results. Wills written in *extremis* are not necessarily, and perhaps not often, first thought out and arranged then, and though the testator’s mind might be dull when called to subjects in which he took no interest, it might not be at all so on the subject of his will.

“If when he dictated his will, his mind and memory were active enough to enable him to understand and direct the business in which he is engaged he was not intestate. It is not a requisite of testamentary capacity that a testator should have recollection of the property he meant to dispose of, or the persons who were the natural object of his bounty, and the manner in which it is to be distributed between them, *where before his last illness he had determined to give* the body of his estate to a stranger, and there was therefore no necessity to recall his property piecemeal, or to recollect his kindred.”

In *Aggas v. Munnell* (1930), 302 Pa. 78, 152 A. 840, a case the appellees discuss in Argument I-B-1, the court went a long way to expand the doctrine when it reversed an order of the lower court in a will case and ordered the lower court to enter an order probating the will.

The appellants (Brief 27) cite the case of *James White Memorial Home v. Haeg*, 204 Ill. 422. In this case the court instructed the jury that even though the testatrix was rational when she gave instructions for preparing her will, if she were insane at the time of execution it would not be her will. The appellees are in accord with the instructions of the court. When it is shown that one is insane then testamentary capacity does not exist.

In *Terry v. Davenport*, 170 Ind. 74, cited by appellants (Brief 27), the instruction offered should have been given since it represents the considered judgment of the vast majority of the courts throughout the land. It is regretted that the law of Indiana is otherwise.

In the case *In re Ross' Will*, 182 N. C. 477, cited also by the appellants (Brief 27), the instructions granted by the trial Judge embraced among other things the elements of competency at the time of instruction for preparation of the will, and incompetency when the will was signed, the same as the *James White Memorial Home v. Haeg*, case *supra*. The appellate court was justified in its reversal.

The appellants attack the trial court's legal premise (Brief 31). They charge that it loses sight of the overall purpose of the Wills Act. This attack and charge of the appellants are unwarranted under the evidence. The evidence in this case is unimpeached on the question of honest mistake. The documents, marked defendants' exhibits "No. 1" and "No. 3," are included in the appellees' appendix (Add. App. 90-95) for the consideration and comparison of this court. A comparison of the two documents will clearly show that Dr. Henderson made no mistakes when he copied in ink the penciled memorandum of the testatrix. They further charge that the rule opens the flood-gate to imposition and fraud. Certainly the appellants are in no position to argue the issue of fraud before this court, since they have abandoned that issue on their appeal. They having abandoned the issue of fraud, we must assume that the trial Judge was without error in his refusal to submit to the jury the issue of fraud. The appellants intimate that the testatrix may have desired to change some items in her will before final execution. The reply to this is two-fold: (1) the penciled memorandum was 18 days old, and in her own personal possession, when the testatrix directed Dr. Henderson to copy it in ink in her presence; if she did not then change any provision, why should one assume that a

change was desired by her less than three hours thereafter; and (2) the burden of proof was upon the appellants to show any intended change of disposition by the testatrix.

The appellants have cited (Brief 33) a Supreme Court case, *Brosnan v. Brosnan*, 263 U. S. 345. They admit that the burden of proof as to mental capacity is upon the caveators. But they say the Supreme Court of the United States accords it as a risk of persuading the jury that the testatrix did not have the capacity to execute a valid deed or contract. A cursory reading of the case, *supra*, does not support the jury argument mentioned by the appellants. The case arose in the Supreme Court of the District of Columbia and, upon appeal to this court, this court certified the question of burden of proof on the question of testamentary capacity to the Supreme Court of the United States. The Supreme Court said:

“Apart from any question of pleading as to the burden of allegation, this rule as to the burden of proof rests upon the ancient presumption in reference to sanity (citing *Higgins v. Carlton*, 28 Md. 115), and viewed from a practical rather than an academic standpoint, it gives effective weight to the presumption of the testator’s sanity and obviates the difficulty which would arise if such presumption were treated as one which merely established a *prima facie* case in favor of the proponent of the will but did not relieve him from the ultimate burden of persuasion on the question of the testator’s mental capacity, involving a nice distinction tending to a confusion in a jury trial, and for this reason, as well as upon the doctrine of *stare decisis*, we have no disposition to modify or change the law of the District of Columbia, as settled in *Leach v. Burr*, 188 U. S. 510.”

This clearly places the burden of proof upon the caveators.

It may be well, at this point, to call to the attention of the court the attitude expressed by the Supreme Court of the United States in the case *Leach v. Burr*, 188 U. S. 510. The facts show that the testator was 73 years of age; that

he had the drafting of his will at a time when he admitted to his pastor that he would not live long enough to validate any bequest or devise that he had planned to make to him and his church, but that he wanted his will prepared, making his entrusted servant sole beneficiary with the hope that the servant would do the right thing by the pastor and his church. The will was prepared as instructed, but at the time it was executed the testator was suffering from acute pneumonia. A caveat was filed against the will, and upon trial of the caveat, the caveators produced as witnesses the pastor and seven physicians, six of whom gave expert testimony on the question of testamentary incapacity. The summary of these opinions was: "That it was contrary to their experience and reading that a man 73 years of age, dying of acute pneumonia, should have testamentary capacity between three and four hours before death." At the close of the caveators' case, upon motion of the caveatees, the trial court directed a verdict for the caveatees on all issues. An appeal was prosecuted to this court, and this court in a unanimous opinion affirmed the ruling of the trial court. A writ of error took the case to the Supreme Court of the United States. In affirming the ruling of the Court of Appeals, the court held: That the burden of proof is upon the caveators and they had failed to sustain this burden.

The appellants refer to the English system (Brief 32) which places the burden of proof upon the proponents of a will, and argue that this accounts for the *ratio decidendi* of the English cases in question. We cannot adopt the reasoning of the appellants in this respect because under the English system where the burden is upon the proponents and the English courts say repeatedly that this burden is met by the proponents of a will "if the testator has given instructions to his draftsman to make a will and the draftsman prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the

testator, is that he should be able to think thus far, 'I gave my draftsman instructions to prepare a will making certain disposition of my property'."

If the requirement of mental capacity under the English doctrine is met by the proponents when the testatrix is able to recollect that she has given prior instructions for the preparation of her will, then what is the rational basis for argument that the American courts, and especially the Court of Appeals, should not adopt the rule validating a will which the testatrix has written in pencil, in her own handwriting, 18 days before death, and on the morning of the day of her death authorizes and directs the same to be copied in ink, and at its completion directs that it be brought to the hospital for execution, and in less than three hours thereafter the will is presented to her at the hospital; she signs it twice, her attending physician signs it, and she asks the other attesting witness to sign her will as a witness to it, especially where the burden of proof is upon the caveators? Upon the basis of reason the American courts are more justified in expanding this doctrine than the English courts, because in our country the burden is on the caveators while in England the burden of proof is on the caveatees.

The appellants have asked several questions (Brief 33) relative to the burden of proof. The simple reply is that the Supreme Court has said that the burden of proof is on them to show incapacity by clear and convincing proof at the time of execution. However, since they failed to sustain this burden, the appellees will show that there are adequate answers to their questions in the record:

Q. Who must bear the burden of showing that she recognized the draftsman?

A. (Record 262) (Add. App. 29) "Hello, Ed."

Q. Did she recall her instructions to the draftsman?

A. (Record 367, lines 2-3) "Dr. Henderson reached the bedside of the testatrix and told her I have your will and she nodded."

Q. And she assumes that the paper in her hand follows her instructions?

A. (Record 463-466) (Add. App. 90) Defendants' Exhibit No. 1. (Record 467-470) (Add. App. 93) Defendants' Exhibit No. 3.

The factual basis of appellees' reply will be discussed elsewhere in our brief. However, in passing, we cannot escape the intended inference of counsel for appellants relative to Dr. Henderson. Dr. Henderson was a trusted friend of the testatrix for a number of years, also a third cousin. His bequest under the will is a ring, a small token of remembrance, valued at \$93.00 by the Court's appraiser.

It should be apparent to appellants that the only question arising out of the ruling of the trial Judge is whether or not there was any substantial evidence on the issue of testamentary incapacity. In the entire argument of the appellants they have failed to point out to this Court any evidence of testamentary incapacity. Therefore, the appellees fully discuss the evidence in Argument I-B of their brief, and by so doing endeavor to point out to this Court the absence of any evidence in support of testamentary incapacity.

B. Evidence Relied Upon by Appellants was Insufficient to Establish Mental Incapacity of Testatrix

The appellants contend that they offered ample evidence sufficient for submission to the jury on the issue of mental incapacity of the testatrix. Let us analyze the testimony of the three physicians in the light of the applicable decisions of our Court of Appeals, the Court of Appeals of Maryland, and of other jurisdictions. Let us then make a reasonable comparison in order to determine whether this testimony was of such character as to impel its submission to the jury.

1. Testimony of Dr. Robert H. Jason

Dr. Jason, a pathologist, who holds three positions: Vice-Dean of Howard University Medical School, Head of the

Department of Pathology at the same school, and Pathologist at Freedmen's Hospital, was permitted to give what may well be termed a medical lecture on the autopsy findings, which included the clinical history at Freedmen's Hospital, relative to the testatrix. (Add. App. 58 —, Appellants' App. 18-29).

Dr. Jason's opinions and observations are based upon the physical condition of the testatrix at 3:20 p.m. According to the preponderance of evidence the execution of the will was completed at 2:20 p.m. The testatrix died of pulmonary embolism. The blood clot in the left leg became dislodged and got into the large artery, blocking that blood-vessel as it extended into the branch going to the left lung. He stated that a cyanotic person is unable to function adequately as compared with other individuals; that the body functions are depressed. There is nothing in the foregoing observations of Dr. Jason that indicate that the memory of the testatrix was affected, or that her brain was impaired at the time of the execution of the will. On the contrary, the doctor said the sensory, the front part, was not impaired. (Add. App. 68). The sensory or frontal part of the brain embraces the thinking part of the brain. Our Court of Appeals has said that:

"To make a will valid it is not necessary that the testator should be endowed with a high order of intellect, not even an intellect measuring up to the ordinary standard of mankind. Nor is it necessary to the making of a will that the party should have a perfect memory, and that his mind should be wholly unimpaired by age, sickness or other infirmities." (*Barbour v. Moore*, 4 App. D. C. 535).

The autopsy findings disclosed that there was hardening of the arteries (arteriosclerosis) and that it appeared to a sufficient degree to cause impairment of the brain. However, Dr. Jason said that this fact did not mean that the brain was impaired in all functions (Add. App. 60); that

the thinking part of the brain was not affected (Add. App. 68). The physical facts show that even though the testatrix sustained a partial stroke on her left side in 1936, she taught school in the public school system of Baltimore, Maryland, for a period, and then as a substitute teacher in the public schools of the District of Columbia through the month of March, 1950.

Dr. Jason was asked, by way of a hypothetical question, whether the testatrix, who was paralyzed 13 years ago on one side of her body, and who suffered pulmonary embolism, one hour before her death could execute a will with knowledge and understanding. He replied that it was unlikely, but there was a possibility that she might have known what she was doing (Add. App. 61). Being asked the question by the Court, based on the autopsy report, he said that he doubted it very seriously. Then he said that he did not think she could, but that the most important evidence would have to come from those who saw her at the time (Add. App. 62). The authorities have held that opinions of expert witnesses, such as Dr. Jason, are of little evidentiary value. In the case of *Acker v. Acker*, 172 Md. 477, 192 A. 327, we find a complete answer to the testimony of Dr. Jason. In this case the Court said:

“ * * * The will in question was dictated by the testator for preparation two or three days before execution; it was signed by testator and witnessed by three witnesses on July 20, 1934. Five issues were framed by the caveator, which included testamentary incapacity.

Exception was noted to the testimony of Dr. Spears, psychiatrist and nerve specialist. The only time Dr. Spears saw the testator was during his commitment at Laurel Sanitarium before his thyroid trouble was corrected; as a result of an examination then made by him, he was permitted to state that on that occasion the testator was demented, crying, and wringing his hands; that his blood pressure was 185 over 165, and that he had hardening of the arteries, and that he was suffering from arteriosclerosis, had a heart murmur, and that this

condition was progressive. He was permitted to give his prognosis made in June 1928, which was to the effect that the patient would never improve mentally.

There is nothing in Dr. Spears' testimony to justify the conclusion that testator's heart murmur, blood pressure, or arteriosclerosis in 1928 were unusual for one of his age, nor that the mental condition at that time was attributable to those factors. Admittedly his mental capacity was then impaired, but subsequent events demonstrated that this was not permanent in character. Therefore, his prognosis was under the circumstances without evidential value, and this is also true as to his opinion concerning testator's mental capacity at the same period. Furthermore, his opinion that the testator's condition as then found, was progressive, must yield to actual facts which showed subsequently that testator's mentality was restored.

Five lay witnesses testified as to the failing physical condition of the testator, and the lower court permitted them to express opinion as to the mental incapacity of the testator.

Dr. Jack testified that he had known testator 40 years, but had not been his physician for several years, except the day of his death; that the testator visited the bank daily and he had many business transactions with him, all of which were satisfactory. He testified that the testator was emotionally unstable; that he could not retain the conversation that he was carrying on.

Dr. Jack never examined testator in his life to determine his mental capacity, and his contact with him for the most part was through business transactions, which he admits testator conducted entirely satisfactorily. He was glad to have his banking business, considered his note good, and admits he had previously stated that testator was capable of making a will. Under these circumstances an expression of a contrary opinion has for its foundation no rational basis.

Dr. Spears returned to the stand and gave opinion evidence that the testator was not able to execute a valid will.

Dr. Knot testified that where one suffering from a stroke received in 1928, causing hemorrhage of the brain, resulting from arteriosclerosis, the stroke affect-

ing the right side of his body and causing permanent impairment of the use of his right arm and leg, and which continued until the date of his death, and that his death was caused by apoplexy of the brain, in his opinion his mentality was impaired.

He does not attempt to state that such impairment, as in his opinion resulted, rendered the testator incompetent to execute a valid deed or contract on July 20, 1934. Since we are of the opinion that the plaintiff offered no legally sufficient evidence to show the paper writing executed by the testator on July 20, 1934, purporting to be his last will and testament, was not executed by him when he was of sound and disposing mind and capable of executing a valid deed or contract, caveat's Prayer 3A, which sought a binding instruction to that effect, should have been granted. For that reason, it is not necessary to refer to other prayers or to pass specifically upon the propriety of the various rulings upon the admissibility of evidence. If all of it could be regarded as admissible, its probative effect, when considered as part of plaintiff's proof as a whole, and in the light of undisputed facts, was inadequate to support the theory that the testator was mentally incompetent when he executed his will."

(See also *Weems v. Weems*, 19 Md. 333.)

This Court, speaking in the case of *Hawley v. Hawley*, 72 App. D. C. 376, said that with respect to matters pertaining to testamentary laws the decisions of the Maryland Court of Appeals are highly persuasive.

On cross-examination Dr. Jason admitted that one in shock could recognize the topographical outline of a paper; that she might be able to recognize it completely; that one might indulge in non-complicated thinking (Add. App. 66). He also admitted that while she may not remember all of her property, she would be able to remember the basic facts but not details; that if she was giving away property, she would still have some knowledge of what she wanted to do. (Add. App. 66).

The foregoing testimony of Dr. Jason, though predicated upon the condition of the testatrix at 3:20 p.m., is in support of the presumption of testamentary capacity. How much more favorable his testimony would have been had it been based upon the actual condition of the testatrix at 2:20 p.m. when the execution of the will was completed. In the case of *Aggas v. Munnell*, (1930), 302 Pa. 78, 152 A. 840, the issues of undue influence and testamentary incapacity were framed. The contestants offered Dr. Lafferty, who testified that at the time of the execution of the will the testator did not have sufficient mind and memory to know and understand the extent of his estate, and to intelligently dispose of same. Several lay witnesses testified to the effect that the testator's memory was exceedingly defective at the time he executed his will; that he was incoherent in his speech, and that he would fail to recognize acquaintances and even members of his family. The verdict of the jury was for the contestants, and on appeal the verdict was reversed with instructions to enter a verdict for the proponents of the will. The Court said, in part:

"Taking the testimony as a whole, it will not in view of our decision, support a verdict against the will on the ground of the lack of testamentary capacity. It is not a question of whether some of the evidence, standing alone, would do so, but whether it would when considered as a whole.

"The proof taken as a whole does not support the finding of the jury on either or both questions stated in the issue, hence judgment is hereby entered for the caveatees *non obstante veredicto*, and the record is ordered remitted that the issue may be set aside and the will probated." (See *Riddle v. Gibson*, 29 App. D. C. 237).

It is evident, therefore, that the testimony of Dr. Jason possessed no evidentiary value competent for submission to the jury on the issue of testamentary incapacity.

2. Testimony of Dr. Alvin S. Robinson

The appellants are relying very strongly on the testimony of Dr. Robinson because, (1) he was a witness for the caveatees as a witness on the proof of the *factum* of the will; (2) he appeared as a witness for the caveators on the issue of testamentary incapacity; (3) he was the physician in charge of the testatrix; and (4) he was one of the attesting witnesses. It is in these respects that we analyze and discuss the testimony of Dr. Robinson.

His testimony revealed the following conflicting opinions and statements: He could not say yes or no as to whether the testator was in a physical or mental condition to make a will (Add. App. 9). Subsequently, he said: He did not think the testatrix could execute a will with knowledge and understanding (Add. App. 27). Again, he said: He told Mr. Shipp that he was not going to pass judgment on the patient's capacity from a mental point of view; that in so far as her muscular activity was concerned, so far as her actual signing, she was able to sign (Add. App. 41). He stated that the patient was conscious at the time of the execution of the will (Add. App. 9). He admitted on the witness stand that on June 3, 1950, he appeared in the office of the deputy register of wills, in proof of the testatrix's will, and on his oath stated that at the time of the execution of the will the testatrix was of sound an disposing mind (Add. App. 40-41). He said: That Dr. Henderson asked him did he think the testatrix was able to sign the will (Add. App. 26). He said: He told him that in a little while he thought she might be able to do so (Add. App. 26).

The foregoing testimony of Dr. Robinson draws no inference of testamentary incapacity. It rather supports the presumption of testamentary capacity.

When asked what time the will was executed, Dr. Robinson said: (1) at 3:00 p.m.; (2) between 3:10 and 3:15 p.m.; (3) an hour before the death of the testatrix, and that she died at 4:30 p.m. (3:30 p.m.); and (4) he did not know when

the execution of the will was completed (Add. App. 27, 32, 36-37, 34). The above contradictory evidence certainly did not add to his credibility as a witness. He stated that the patient was in excruciating pain from the time she came in until her demise (Add. App. 7), yet he said, at the time of the execution of the will, the pain had abated somewhat because her reaction was not as great (Add. App. 30). He said: that they were cutting down in the vein of the patient in order to start the fluid, and he suspended this in order to bring Dr. Henderson to the beside of the patient to execute her will (Add. App. 27). In response to a question on cross-examination as to whether the getting ready of the clysis and the intravenous injection was done *subsequent* to the execution of the will, he said: To the best of his recollection it was (Add. App. 45). He stated that at the time of the execution of the will no life fluid or saline had been injected into the patient (Add. App. 23).

These conflicting statements of Dr. Robinson not only failed to increase his credibility as a witness for the caveators, but it clearly shows that he did not suspend the cutting down into the vein of the patient in order to permit Dr. Henderson to have the will executed. Our contention in this respect is strengthened by the testimony of Dr. Swan, a witness for the caveators, who admits that the main thing he did when he was in attendance on the patient was to attempt to cut down in her vein (Add. App. 73). Dr. Swan said he was present when oxygen was started (Add. App. 77); that he was not there when Dr. Robinson and Dr. Henderson were talking to the testatrix (Add. App. 78); that he did not know Dr. Henderson (Add. App. 72); that he did not at any time see Betty Lurton sign a paper (Add. App. 72). But the hospital clinical record shows that the testatrix was examined by Drs. Robinson, Keller, Lloyd, Swan, and Forcia at 2:30 p.m. and that they injected blood and saline solution into the veins of the patient thereafter (Appellants' App. 22); all of which shows that the will was

executed before 2:30 p.m., because Dr. Robinson has admitted that Dr. Keller did not see the patient until after the execution of the will (Add. App. 3). It shows, further, that Dr. Robinson was not entirely honest in his testimony when he said he suspended cutting down in the vein of the patient in order to have Dr. Henderson come to the bedside of the patient to have the will executed.

There is evidence in the record which tends to show that the testatrix also requested Dr. Robinson to sign her will. The testimony of Dr. Robinson shows:

"Well, of course, we were all around Miss Sabbs' bed, all of us in the party, at that time. Now, whether I was standing right behind Miss Sabbs' bed at the time she asked me or whether I was a little away from it, I mean, I do not recall that" (Record 44) (Add. App. 12).

"Q. Did she say, will you sign this?"

"A. As I said, I don't know, because at that particular time I was being over her, standing beside the bed, putting my signature on the will (Record 268) (Add. App. 32).

Dr. Robinson, in his insistent disrespect for veracity, testified as follows relative to the administration of medication at the time of the execution of the will: (1) that the patient was under nasal oxygen (Add. App. 5); (2) that they had not started the oxygen therapy and saline solution (Add. App. 28); (3) that the patient was not receiving any type of medication at 2:15 p.m. (Add. App. 23); (4) that they had started the oxygen (Add. App. 45).

The discrepancies in the testimony of Dr. Robinson are very apparent. He, as an attesting witness, was under a duty to inquire into the mental competency of the testatrix. (See *Thompson v. Smith*, 70 App. D. C. 69.) And as her physician in charge he owed his patient full medical protection, as well. Dr. Henderson sought his medical advice before he tendered the will to the testatrix for execution, and was told by him that in a little while she will be able to sign it, and thereafter he brought Dr. Henderson to

the bedside of the testatrix to have the will executed. There is no suggestion from Dr. Robinson, at this point, that the patient could not sign the will with knowledge and understanding. Nothing is said by him to Dr. Henderson relative to a blood pressure of 0/0, or that the patient was suffering from excruciating pain, or that she may be in deep shock. On the other hand he signs as attesting witness to the will and he goes out into the ward and secures head nurse Betty Lurton as the other attesting witness. He appeared before the deputy register of wills on the 3rd day of June, 1950, and swore before him that the testatrix was of sound and disposing mind at the time of the execution of her will. His testimony and conduct on the witness stand revealed for the first time that Dr. Robinson entertained any doubt about the mental capacity of the testatrix. He has sworn to conflicting opinions and thereby has become a discredited witness in the eyes of the law. Distrust and incredulity have encompassed him on the issue of testamentary incapacity. It is this type of danger that Justice Robb had in mind in the case of *Emerson v. Riley*, 41 App. D. C. 480, when he said:

“That the entire testimony of a witness who is clearly shown to have testified falsely on a certain point is entitled to little consideration, for the Courts are bound by principles of law, morality, and justice to apply the maxim ‘*falsus in uno, falsus in omnibus*,’ which is founded on the theory, not that a witness who has wilfully prejured himself is incapable of speaking the truth as to other facts, but rather that the motive that prompted him to commit perjury in one part of his testimony may lead him to support it by falsifying other parts.”

If we were to assume for the purpose of the argument that Dr. Robinson is not a discredited witness, what evidence emanating from his testimony adduces an inference of testamentary incapacity, when his testimony is considered as a whole? Certainly the cyanocism of which he

speaks does not impair the brain in any respect. He did not say that the testatrix's memory was affected by it. There is no suggestion from him that the excruciating pain affected her mental powers, her memory or her brain. He termed a cyanotic condition as a change from the normal, caused by insufficient blood aeration. This proves nothing on the issue of mental incapacity. Even though the doctor is not a psychiatrist, he may be reminded as a physician that capacity to make a will is not limited to the normal person, and to invalidate a will, an abnormality must actually impair testamentary capacity at the time of the execution of the will. The inability of the testatrix to give a coherent history of her case, did not prevent her from greeting Dr. Henderson, when she said, "Hello, Ed," just before the execution of the will. It took some strength of mind and will to have said that. Her suffering and crying out in excruciating pain did not prevent her from asking Dr. Henderson, "Ed, what are they going to do with me?" It took some strength of mind and will to ask that question. It took some strength of mind to affix her signature twice to the will, and it required her strength and mind to request Mrs. Lurton to witness her signature to the will. These are unassailable facts which occurred during the process of the execution of the will, and they tend to prove testamentary capacity, rather than testamentary incapacity.

So, then, we have Dr. Robinson giving conflicting testimony. We have him contradicting himself. He has flagrantly violated both his obligation to his patient and his duty as an attesting witness. Moreover, he has discredited himself either as a witness in the caveat trial or in his oath before the deputy register of wills. His testimony stands before this Court in the same light as the witness described by Mr. Justice Robb in the case of *Emerson v. Riley, supra*. His testimony is discredited and was valueless, on the issue

of testamentary incapacity. The trial Court was without error in its refusal to submit it to the jury on this issue.

3. Testimony of Dr. James Swan

Dr. Swan stated that he was present when the oxygen was started, but he did not know at what time it was started (Add. App. 77). He did not see Dr. Henderson at all (Add. App. 78) and he never saw Mrs. Lurton, the head nurse, at the bedside of the patient; he only saw her in the ward. He did not attempt to get full history from the patient, because the whole time he was there he was busy trying to get into the veins of the patient (Add. App. 73). Dr. Swan stated that he first saw the patient on Ward 10 between 1:30 and 2:30 p.m. (R. 218); that they took or attempted to take her blood pressure; that they checked the pulse, and listened to her heart and lungs (Add. App. 69-70). He also said that he was there when Dr. Robinson arrived (Add. App. 70). He stated that the patient died from pulmonary embolism; that the bloodclot was dislodged from the left leg and lodged in the pulmonary vessels (Add. App. 77); that the embolism might have started at any time; he did not know when it started; that one can be well and die the next moment from the occurrence of a pulmonary embolism (Add. App. 78-79).

A reasonable deduction from Dr. Swan's testimony is that he was not present when the will was executed; that Dr. Robinson came in after he arrived at the patient's bedside, which means, from the combined testimony of both doctors, that Dr. Robinson was returning from his consultation with Dr. J. B. Johnson and the subsequent call for Dr. Keller, and that the cutting into the veins and the medical treatment administered by them were performed after the execution of the will. Dr. Swan's testimony reasonably relates to what took place after 2:30 p.m. (Appellants' App. 22); had he arrived earlier he would have seen Dr. Henderson, Dr. Robinson, Mrs. Lurton, and Mrs. Tyree at the bed-

side, and others whose testimony will be discussed under a separate subject. Dr. Swan did not see the execution of the will and was not asked to give an opinion on the issue of testamentary capacity. His testimony is valueless on that issue, because of the fact that it has no bearing on the mental or physical condition of the testatrix at the time of the execution of the will.

On the whole, the trial Judge was justified in not submitting to the jury the testimony of the three physicians on the issue of testamentary incapacity.

The case of *Grant v. Curtis*, 71 A. 2d 304, decided by the Maryland Court of Appeals on February 8, 1950, supports strongly the contention of counsel for the appellees.

C. The Unchallenged Evidence Shows Testamentary Capacity

It may be seen that at the time of the ruling of the trial Judge with respect to his preemptory instructions to the jury, there was not only a total absence of any substantial evidence on the issue of testamentary incapacity, but there was unchallenged evidence in support of testamentary capacity. The evidence was uncontradicted that the testatrix had written her pencil memorandum on April 19, 1950, making a complete disposition of all her property. The evidence was uncontroverted that the testatrix requested Dr. Henderson, on the morning of May 7, 1950, to copy her pencil memorandum in ink and approved same section by section as Dr. Henderson completed the copying of each said section. (Appellants App. 2). The testimony is unassailed that the testatrix agreed with Dr. Henderson to wait until she arrived at the hospital to have her will executed (Appellants App. 2).

The evidence is undenied that the testatrix was rational and unpainful upon admission on Ward 10 (Add. App. 84). That the testatrix gave Nurse Tyree a full nurse's history of her case, answering all questions put to her by Nurse

Tyree, and that she conversed with Nurse Tyree intermittently until immediately prior to the execution of the will (Add. App. 84). That the testatrix held conversations with Dr. Robinson prior to the execution of her will relative to her medical condition (Add. App. 3). It is not questioned that the testatrix said almost simultaneously with the execution of her will: "Hello, Ed; what are they going to do to me out here?" (Add. App. 29). It is not questioned that the testatrix asked Mrs. Lurton to sign as a witness to her will (Add. App. 49). It is undenied that Nurse Tyree heard the testatrix request Mrs. Lurton to sign as a witness to her will (Add. App. 82). It is not denied that the testatrix said it was her will (Add. App. 83).

It is not controverted that the testatrix signed the will and that the will which she signed was the same one copied in ink by Dr. Henderson under her direction on the morning of May 7, 1950 (Add. App. 90-95).

It is unassailed that when Dr. Henderson reached the bedside of the testatrix he told her that he had her will and "she nodded" (Rec. 367. L. 2 & 3).

It is not denied that shortly after the execution of the will Pauline Dobbins went to her bedside and talked with the testatrix for a few minutes; that the testatrix appeared to be cheerful, and that the testatrix at that time told her about matters pertaining to the testatrix's home (Rec. 371, L. 21 to 27).

The foregoing is an analysis of the unimpeached evidence of the testamentary capacity. The law presumes the existence of testamentary capacity after due execution of the will is shown. This presumption coupled with the unchallenged evidence of testamentary capacity make a strong case of wholly unimpeached capacity. Where the capacity of the testatrix is unimpeached, and in the absence of fraud, the law presumes a knowledge on the part of the testatrix of the contents of the paper which she executes. *Cramer v. Crumbaugh*, 3 Md. 491.

The burden of showing testamentary incapacity at the time of the execution of the will is upon the caveators and this burden must be borne by them by clear proof. *Barbour v. Moore*, 4 App. D. C. 535.

The evidence plainly shows that the testatrix knew that she was executing her will which she had Dr. Henderson to copy in ink from her pencil memorandum. The plain intentment then is that the testatrix knew that it was a paper carrying out the directions she had given Dr. Henderson earlier in the day and of which she had approved. If she did not know this under the circumstances it would be because a fraud was practiced upon her. However, fraud cannot be presumed. It was incumbent upon the appellants to show it, and since the appellants have abandoned their theory of fraud, they now concede the argument and are estopped from raising the question before this Court. It is therefore apparent that the evidence affecting the inquiry on the issue of testamentary incapacity affords no warrant for an inference that the testatrix did not know the contents of her will at the time of its execution, or that she did not possess testamentary capacity. *Baughner v. Gessell*, 103 Md. 450, 63 A. 1078.

D. Testamentary Capacity at Time of Giving Instructions for Will Does Affect Measure of Capacity Which Must Exist at Time of Execution

The Maryland Statute of 1798 presently is cited as Sections 335 and 336 of Flack's annotated code of Maryland (1939). The Maryland Statute was guided largely in its enactment by the Statute of 29 Charles II, Chapter 3, Section 5, more familiarly known as the English Statute of Fraud of 1676. The District of Columbia used the Maryland Statute of Wills from 1801 through 1901, when our code became effective. Our Statute of Wills is substantially the same as that of Maryland. The English cases of *Parker v.*

Felgate, L. R. 8 Prob. Div. 171, and *Perera v. Perera*, L. R. A. C. 354, 2 B. R. C. 33, are cases construing the foregoing British Statute. These cases hold that where instruction for the preparation of a will was given at a time when testamentary capacity is unchallenged, it is sufficient at the time of execution, if the testator possesses enough capacity to understand and did understand that she was engaged in executing the will for which she had given instruction to the draftsman. These decisions have had their influence on the decisions of the Court of Appeals of Maryland, and of right they should, because of the close proximity of the contents of the two statutes. The Sabbs case is a much stronger case factually than the English cases cited and to be cited by us. Miss Sabbs first wrote her own will 18 days before her death. It was pencil-written and unsigned by her. It disposed of all her property in 16 different bequests and devises. Miss Sabbs did not give instructions for the preparation of her will; in lieu thereof, she summoned to her bedside on the morning of the day of her death, her cousin and trusted friend, and told him of her pencil-written memorandum being in the closet in her room. She told him that she had been advised that a will written in lead pencil was not a good will, and that she desired him to copy this lead pencil momerandum in ink. She did not tell him to take it out of the room and copy it, but she caused him to sit alongside of her bed, where she was lying at the time, to effectuate the copying in ink. He read each paragraph to her after he copied same in ink, and after the lead pencil memorandum was fully copied in ink, she directed that it be brought to her at Freedmen's Hospital for execution, where she was being taken, and to be witnessed by people who were not interested in her property. So then we have a testatrix whose capacity was admitted when she directed the copying of her penciled memorandum, and whose capacity was fully competent when she executed her

will less than three hours later. Dr. Robinson said she was conscious at the time (Add. App. 9). He said she was of sound and disposing mind at the time (Add. App. 40-41). He said he thought she might be able to sign the will (Add. App. 26). He said she was physically competent to sign the will (Add. App. 41). Dr. Jason said even if she were in shock, she would know basically what property she had decided to give away (Add. App. 66). He said she would know who her relatives were (Add. App. 66). Miss Tyree, the nurse, said the will was executed at approximately 2:15 p.m. (Add. App. 84). She said that the testatrix was rational when she executed her will (Add. App. 84). Betty Lurton, the head nurse, said she had observed more than a thousand patients; that the testatrix knew what was going on and that she was of sound mind at the time she executed her will (Add. App. 55). The testatrix conversed with Dr. Henderson at the time of the execution of her will (Add. App. 29). These are factors to show affirmatively that the Sabbs case is much stronger factually than other cases supporting the doctrine enunciated above. The limitation of space has impelled the appellees to desist in their effort to set out at length in their brief the facts and holdings of the Courts in the following cases, which are authorities under the doctrines now being discussed:

Cramer v. Crumbaugh, 3 Md. 491 (1853), (citing *Bilinghurst v. Vickers*, 1 Phillmore, 187 Eng. Eccl. Rep. 452, *Fawcett v. Jones*, 3 Phillmore, 434, and *Butlin v. Berry*, 1 Curteis, 614); *In re: Mathers' Will*, 76 Vt. 209, 56 A. 982; *Hawthorn v. King* (1812), 8 Mass. 371; *McMaster v. Blair*, 29 Pa. 298; *O'Brien v. Dwyer*, 45 N. J. Eq. 689; *Clifton v. Clifton*, 47 N. J. Eq. 227, 21 A. 333; *Lindsey v. Stephen*, 229 Mo. 600, 129 S. W. 641; and *Re: Wild* (1902), 77 N. Y. S. 164.

It appears that under the above cited decisions the trial Judge was without error in his refusal to submit the issue of testamentary incapacity to the jury.

E. The Court Below Was Justified in Directing a Verdict For the Caveatees

The proof of the *factum* of the will having been established beyond question, it then became the burden of the caveators to establish by clear and convincing evidence the mental incapacity of the testatrix at the time of the execution of the will (*Brosnan v. Brosnan*, 263 U. S. 345). The appellants cannot successfully contend that they have met this burden through the testimony of Drs. Jason, Robinson, and Swan. The record shows as to Dr. Jason that his opinions are not directed to the time the will was executed, but rather to one hour after its execution; that even if it were directed to the moment of execution, his opinions were too doubtful and general to create a rational inference competent for submission to the jury. Much of Dr. Jason's testimony is in support of testamentary capacity, and it seems that instead of proof of testamentary incapacity by Dr. Jason, the appellants have supported the existing presumption of testamentary capacity.

The appellants have failed to establish any evidence of testamentary incapacity through Dr. Robinson, whose testimony purportedly on the issue of testamentary incapacity, is so contradictory and conflicting until it has brought discredit upon its evidentiary value.

The testimony of Dr. Swan clearly shows that he was not there before the will was executed, and that the work he did while in attendance was subsequent to the execution of the will.

The Maryland Court of Appeals has excoriated this type of medical expert testimony. The Court proceeded on the salutary presumption of sanity. It takes the position that this right of testamentary disposition of property should not be imperiled by such inconclusive and uncertain testimony as that of Drs. Jason, Robinson, and Swan. (See *Gesell v. Baugher*, 100 Md. 667, 60 A. 481, and *Scheller v. Scheller*, 153 Md. 547, 138 A. 415). The Maryland decision

relative to testamentary incapacity is that unless want of capacity, permanent in character be established by proof as existing at a time prior to the act of execution, the presumption of capacity attends the act, and must be overcome by evidence that affords a rational basis for an inference of the want of capacity at the *very time of the execution of such act*. (See *Baughner v. Gesell*, 103 Md. 450, 63 A. 1078). Whatever may have been the testatrix' mental condition at 3:20 p.m. on the afternoon of May 7, 1950, offered no rational basis for an inference of testamentary incapacity at 2:20 p.m., the time that the execution of the will was completed. Our Court of Appeals has had an occasion to pass on this question in a most recent opinion, in the case of *Harris v. Ricketts, et al*, No. 10,750, decided November 1, 1951. In this case the lower court directed a verdict for the caveatees on all issues then pending before the court. One of the issues that formed the basis of the appeal was the fact that the testator stated in his will that he had no living relatives, where it was shown that he had at least eight next of kin at the time the will was executed. The appellant contended on appeal that this falsity constituted substantial evidence on the issue of testamentary incapacity and that the trial judge erred in his refusal to submit this evidence to the jury on the issue of testamentary incapacity. This court, however, affirmed the ruling of the lower court, holding that the evidence created no reasonable inference of mental incapacity competent for submission to the jury.

In the Sabbs case, it is true that during the trial there was no objection on the part of the appellees to the admission of the clinical record and autopsy report in evidence. At the time of the trial the executrix was *eo nomine*; the executrix is now *de jure*. Substantially, the only evidence tendered by the appellants on this appeal relates to medical testimony and the hospital record. Under the decisions of this court, this evidence is clearly inadmissible. The phases of the hospital record admissible are the patient's age, ad-

dress, and cause of death. The appellants' case will not be any stronger without the aid of this medical evidence and hospital record. We cite herewith the cases of this court that have held such evidence to be inadmissible under Title 14, Section 308 of the District of Columbia Code (1940 Ed.); (*McCartney v. Holmquist*, 70 App. D. C. 334; *Thompson v. Smith*, 70 App. D. C. 65; *Labofish v. Breman*, 60 App. D. C. 397; *Hutchins v. Hutchins*, 48 App. D. C. 495; *Calhoun v. Jacobs*, 79 App. D. C. 29; and *Eureka, Maryland Assurance Co. v. Gray*, 74 App. D. C. 191; *Kaplan v. Manhattan Life Ins. Co.*, 71 App. D. C. 250). This Court may of its own motion strike from the record any incompetent evidence. (See *Baltimore & P. R. Co. v. Trustees, etc.*, 91 U. S. 127 (D. C.); *Nallie v. Oysters*, 230 U. S. 165; and *National Saving and Trust Co. v. Ryan*, 49 App. D. C. 159.

ARGUMENT NUMBER II

PROOF OF THE FACTUM OF THE WILL WAS DULY ESTABLISHED

The appellants have questioned the due execution of the will. They say in substance that the will was not subscribed and attested in the "conscious" presence of the testatrix, and that this failure renders proof of the will inadequate and insufficient. However, in this case the contention of the appellants cannot stand, especially in view of the evidence to which we shall refer.

It is in evidence that Dr. Robinson saw the testatrix sign the will and that he signed it in her presence (Add. App. 29). It is the evidence that Dr. Robinson requested Mrs. Lurton to sign the will as a subscribing witness (Add. App. 33). It is in evidence that Mrs. Lurton, pursuant to Dr. Robinson's request, went to the bedside of the testatrix, and was asked by the testatrix to sign as a witness to her will (Add. App. 49, 51). All of this evidence is uncontroverted and unassailed.

Inasmuch as the uncontradicted and unchallenged evi-

dence on the issue of proof of the factum of the will, clearly establishes (1) that Dr. Robinson saw the testatrix sign the will and that he signed it in the presence of the testatrix, and (2) that Mrs. Lurton signed the will at the request of the testatrix. The evidence then on this issue is subject to the applicable operation of law. It may be well to note in this respect that the original statute of wills was embodied in the English Statute of Fraud of 1677, cited as Section 5, of Chapter 3, 29 Charles II. The original Will Act of Maryland of 1798 was substantially the same as the English Statute. The Maryland Statute is presently cited as Flack's Annotated Statute of Maryland (1939), Article 93, Section 335. In the District of Columbia, Title 19, Section 101 and 103, is patterned after the said Maryland Statute. It is more or less self evident that in construing Title 19, Section 101 and 103 of our Code, we must take into consideration the decisions of the high courts of England and Maryland, in which similar constructions were made in respect to those statutes.

It is not necessary to indulge in a discussion of the leading English cases on the question of due execution of a will, since a learned analysis of these cases now form an integral part of many of the decisions of our Court of Appeals on the question here presented. We find in the case of *In Re: Porter's Will*, 9 Mackey (D. C.) 493, the court discussed at length and compared the English Statute of Wills, 29 Charles II, and the Maryland Statute of Wills, enacted in 1798. Our Court of Appeals made a careful analysis of the decision of Lord Mansfield in the case of *Wyndham v. Chetwynd*, 1 Burr. 421, and the case of *White v. Trustees of British Museum*, 6 Bing. 309, in which Chief Justice Tindal delivered the opinion of the court, and in so doing the court reached the following conclusion:

"We accept as authority the line of cases which we have cited; they show that within the meaning of the Statute of 29 Charles II, attestation is properly made

either (1) when the witness has seen the testator sign the instrument, or (2) has heard, after it has been signed, acknowledged that the act was his. They show that this acknowledgment may be conveyed either by words, or by acts which indicate to the witness that he is called upon to act in the capacity of a witness. They show too that it is not necessary to the effectiveness of this acknowledgment or of the attestation that the witness should know the nature of the instrument produced and submitted for his attestation."

The *Porter* case, *supra*, establishes the law on the issue of proof of due execution, or *factum* of a will. The proof of due execution of the will in the Sabb's case fits safely within the language of this decision. The *Porter* case, *supra*, was cited with approval in the case of *Notes v. Doyle*, 32 App. D. C. 413, and in this case Mr. Justice Van Orsdel speaking for the court said:

"It is well settled, both by the English and American decisions, that a subscribing witness to a will need not know the contents of the document, they may attest it without the presence of each other, they or any of them need not see the testator sign, provided he acknowledges the signature to each of the witnesses, and they need not ever know that the document they have witnessed is a will."

This is the rule laid down also by Lord Mansfield in *Wyndham v. Chetwynd*, *supra*. The *Porter* case, *supra*, was approved by the use of strong language in the case of *Peters v. Peters*, 64 App. D. C. 331.

The contention of the appellants that the caveatees were charged with the burden of showing that the execution of the will was in the conscious presence of the testatrix is without foundation, if by the word "conscious" the appellants mean testamentary capacity. In the trial of the issues framed in a caveat to a will, the caveatees have the burden of establishing proof of the execution of the will. This requirement is met according to the cases cited above,

when it is shown that the will was signed by the testatrix, that one of the subscribing witnesses saw the testatrix sign the will and he signed in her presence, that the other subscribing witness was asked by the testatrix to sign her will and this witness signed her will in the presence of the testatrix. We submit that counsel for the appellants admitted during the trial of the caveat that this was sufficient to constitute due execution of the will (Add. App. 53). The burden was then on the appellants to show the lack of testamentary capacity. In the cases of *Quimby v. Greenhawk*, 166 Md. 335, 171 A. 59, and *Grant v. Curtis*, 71 A. 2d 304, decided February 8, 1950, by the Maryland Court of Appeals, the high Court of Maryland points out the distinction between the issues of due execution of a will and the issue of testamentary incapacity.

It is therefore the position of the appellees that the trial Judge did not err in his refusal to submit to the jury the issue:

“Was the said paper writing dated April 19 and May 7, 1950, purporting to be the last will and testament of Marion E. Sabbs, deceased, executed and attested to in due form as required by law?”

CONCLUSION

The appellants have failed to prove a case for submission to the jury. Instead their proof shows affirmatively that Miss Sabbs was of sound and disposing mind before and at the time she made and executed her will. The judgment appealed should therefore be affirmed.

Respectfully submitted,

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OTHO D. BRANSON,
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WENDELL R. SHIEF,
1317 R Street, N.W.
Washington, D. C.
Attorneys for Appellees.

APPENDIX

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

No. 11,015

HENRY A. COLLINS, ET AL.,
Appellants,

v.

PAULINE DOBBINS, ET AL.,
Appellees.

APPENDIX

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EXCERPTS FROM PROCEEDINGS AND TESTIMONY

• • • • •

28 Thereupon

DR. ALVIN ROBINSON

was called as a witness by and in behalf of the caveatees and, having been first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Branson:

Q. Give your full name and address. A. Alvin S. Robinson, 1006 Rhode Island Avenue, Northwest.

Q. You are a practicing physician in the District of Columbia? A. Yes, I am.

Q. How long have you been so practicing? A. Since 1944.

Q. Now, directing your attention to the 7th day of May 1950, did you have occasion to be at Freedmen's Hospital? A. Yes, I did.

Q. Did you see there Marion E. Sabbs? A. Yes, I did.

Q. Did you see this paper writing there (showing the witness a paper writing)? A. I saw something similar to this.

29 Mr. Thompson: Will you speak up so that I can hear you?

The Witness: I saw something similar to this.

By Mr. Branson:

Q. I show you this and ask you, is this your signature? A. Yes, that is my signature.

Q. Now, were you requested to sign that? A. I was.

Q. When you were requested to sign that, had Marion E. Sabbs signed that at the time you were present, and that she signed that at the time you were present? A. Yes, she signed it in my presence.

By the Court:

Q. Just a minute. Who signed it first? Did she sign it first or did you sign it first? A. She signed it first.

The Court: All right.

By Mr. Branson:

Q. At that time could you state whether she was of sound mind or not?

The Court: That is not the question at this time.

By Mr. Branson:

Q. She signed it, did she not? A. Yes, she signed it.

Q. And she signed it in your presence? A. Yes, she did.

Mr. Branson: That's all.

30 Mr. Thompson: Mr. Branson, was this attached?

Mr. Branson: That is the way it came from the Recorder of Deed's office. Whether it was attached I don't know.

Mr. Thompson: From where?

Mr. Branson: The Register of Wills' office.

CROSS EXAMINATION

By Mr. Thompson:

Q. Now, Dr. Robinson, what time of day or night was this alleged paper writing signed?

The Court: Speak up so that the jury can hear you.

A. It was approximately about an hour before the patient died.

By Mr. Thompson:

Q. About one hour before the patient died? A. Say an hour and a half, something like that.

Q. Will you tell his Honor and the ladies and gentlemen of the jury the condition that Marion E. Sabbs was in

when she allegedly signed this will? A. She was lying in bed, flat on her back.

Q. Flat on her back? A. Yes.

Q. And by "flat" do you mean something like this (indicating)? A. Yes.

Q. Were you administering any type of drug to her?

31 A. She was under treatment from the time she came in.

Q. She was under treatment from the time she came in. And were you giving her treatments? A. Yes, I was.

Q. Now, Doctor, you say that was—Was there another doctor assisting you in giving her treatment? A. Yes, there were.

Q. Will you state to his Honor and this jury here who the other doctor was? A. Well, one was an interne, that was Dr. Forshet, and Dr. Swann, and several other people that I cannot recall.

Q. Was there a Dr. Donald Keller there assisting you in treating her? A. Not when she first came in.

Q. Did there come a time subsequent to the time when she first came in when Dr. Keller was there? A. Yes.

Q. Tell me, sir, if you know, did Dr. Keller assist in treating her prior to the time she signed the will or subsequent to the time? A. Subsequent.

Q. Subsequent. Did you have a conversation with Miss Sabs at that time? A. I had a conversation with her, so far as her medical condition was concerned.

32 The Court: What is that?

The Witness: I had a conversation with her so far as her medical condition was concerned.

By Mr. Thompson:

Q. Was she incoherent, Doctor? A. Most of the time she was.

Q. Most of the time she was incoherent. Will you tell us specifically at the time you say she signed the paper writ-

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By Mr. Thompson:

Q. Was she incoherent, Doctor? A. Most of the time she was.

Q. Most of the time she was incoherent. Will you tell us specifically at the time you say she signed the paper writ-

ing—did you hear her say anything at that particular time?

A. Do you mean concerning the will?

Q. Yes. A. No, sir.

Q. You didn't hear her say anything. Did Marion E. Sabbs ask you to sign this paper writing, Doctor?

May I say, we have a Reporter here, and you must answer so he can hear you; he cannot hear you shake your head.

A. No, she didn't.

Q. She didn't talk—Speak so I can hear you back here—Did you hear her say or ask anyone else—Marion E. Sabbs—anyone else to come in and witness this will? A. No, I didn't.

Q. Will you tell his Honor and the jury how you happened to sign this paper writing? A. I was asked to be a witness to her signature by Mr. Henderson.

33 Q. You were asked by Mr. Henderson? A. Yes.

Q. Did you, Dr. Robinson, at any time hear Marion E. Sabbs tell Dr. Henderson to ask you to be a witness? A. No, I didn't.

Q. Did you at any time hear Marion E. Sabbs say to anyone else, "Get a witness for this"? A. No, I didn't.

Q. Did you at any time hear Marion E. Sabbs ask Dr. Henderson to be a witness to it? A. No, I didn't hear that.

Q. Then, Doctor, about how long did Dr. Henderson spend with Marion E. Sabbs on this particular morning, May 7, 1950, to the best of your recollection? A. Oh, approximately twenty minutes.

Q. Did you hear any conversation at any time between Marion E. Sabbs and Dr. Henderson? A. No, none other than when he first came up to her bed. I mean, she recognized who he was and spoke to him.

Q. What did she say to him when he first came up to her bed? Do you remember? A. I cannot recall; just probably she spoke his name.

Q. That is all. Did you hear Dr. Henderson speak her name? A. Yes.

34 Q. Will you tell us to the best of your recollection, give us a description how the things surrounding the bed, if anything, were there? A. Well, at the time, we had each bed separated by curtains, and we had these curtains drawn at that particular time.

Q. Yes. A. And due to the patient's condition at that time, she was under nasal oxygen.

By the Court:

Q. What? A. Oxygen.

Q. A tent? A. No, we had tubes in her nose and the tubes were connected with an oxygen tank.

Mr. Thompson: Pardon me, Dr. Robinson. These two jurors, apparently, are not able to hear you; will you speak a little louder?

The Witness: Shall I repeat what I said?

Mr. Thompson: Yes.

The Witness: I said the beds are separated by curtains—

By Mr. Thompson:

Q. Yes. A. We had the curtains drawn, I know, on one side of the bed; maybe on two sides of the bed, but
35 I know the bed was—one end of the bed was open.

Also I said she was under nasal oxygen, that she had a catheter in her nose which was connected to an oxygen tank at that time, and also—I don't recall whether we were giving her intravenous medication. I know she was given intravenous medication out there.

Mr. Thompson: Will your Honor indulge me a moment?

By Mr. Thompson:

Q. Doctor, you mentiooed some type of intravenous treatment that you thought you gave her. Is that treatment termed "life Fluid" sometimes, Doctor? A. Yes; that is right.

Q. You were giving her life fluid at that time; is that right?

A. I cannot say we were actually giving it to her at that time, I don't recall, but I know that we were making preparations to do so.

Q. Now, all these preparations, Doctor, were made prior to the time she allegedly signed this paper writing; isn't that true, sir? A. Well, you could say some of them were given about the time that the paper was signed.

Q. Yes. Now, Doctor, can you tell us who was behind this curtain that was partially drawn about the bedside?

A. Dr. Henderson.

36 Q. Anybody else? A. Nobody else.

Q. Do you know a nurse named Mrs. Betty Lurton?

A. Yes; I do.

Q. Was she behind the curtain at that particular time?

A. Not at that particular time.

Q. Do you know a nurse named Miss Tyree? A. Yes.

Q. Was she behind that curtain? A. No.

Q. Doctor, was this patient complaining of pain? A. Very much so.

Q. Very much so?

By the Court:

Q. Where was the pain? A. In her chest.

Q. And her condition, was that a heart condition? A. Well, it finally turned out to be. At the time we saw her we didn't know exactly what it was.

By Mr. Thompson:

Q. Was the final diagnosis angina? A. No, the final diagnosis was pulmonary embolism.

Q. Was there a subsequent diagnosis that she had tumor of the vagina, also? A. No. She had tumor of the uterus and that was pulling up the abdominal cavity.

37 Q. And was there any other subsequent diagnosis given of cerebral injuries, to her head? A. That was one of what you might call written diagnoses. When we

first saw her we had had no prior association with the patient at all, before she came into the hospital.

Mr. Thompson: You will have to speak up a little louder, Doctor. One lady here cannot hear you.

The Witness: I said, that was the first diagnosis. When she first came into the hospital, we had no prior association with the patient, until the time she came in; this was the first time we saw her, when she came in that day.

By Mr. Thompson:

Q. Do you know Hattie Watson? A. I know her by seeing her at the time the deceased came into the hospital.

Q. Did you see her there this particular day? A. Which particular day?

Q. May 7, 1950 did you see Hattie Watson up there? A. Yes.

Q. How long after Dr. Henderson came in was it before the patient died? A. Oh, approximately an hour and a half.

Q. Now, from the time Dr. Henderson came in, you told us that he talked with the deceased, Marion E. Sabbs, 38 —she said something to him—was she in excruciating pain from that time until her demise? A. Yes, she was in excruciating pain from the time she came in until her demise. I mean, the whole time she was there she was quite painful.

Q. Doctor, was she an emergency patient? A. Very much so.

Q. Did you at any time see Miss Sabbs read this paper or any other paper? And by "this" I mean the exhibit that Mr. Branson showed you. A. No; I didn't.

Q. Did you, Doctor, at any time see Dr. Henderson or any other person show or read to Miss Sabbs this paper or any other paper? A. No; I didn't.

Q. Did Dr. Henderson ask you if he, Dr. Henderson, could talk with the patient? A. Yes; he did.

Q. And did you make any response to that question? A.

Well, I responded that first of all I wanted to see the reaction of the patient before I permitted him to talk to her.

Q. Did you, sir,—

By the Court:

39 Q. What did you tell him, Doctor? A. I told him I wanted to see how the patient was getting along, before I permitted him to talk to her.

Q. Then what happened? A. Then, after I looked at the patient, I permitted him to go in and see her.

By Mr. Thompson:

Q. Now, was she, at that time, in your opinion, in a condition to read or understand a will or any paper writing?

The Court: That is not the question here at this time.

Mr. Thompson: Very well, your Honor; I will withdraw it.

The Court: I know, but the only question at this time is whether or not it can fairly be implied that she made a request, and the request is implied from the fact of her signing first and the witnesses signing afterwards. That is as far as you can go at this time, and it is the burden of the caveators to show that she was not in any position to make a request, and therefore the implication does not exist. That is as far as you can go.

Mr. Washington: May we approach the bench?

The Court: All right.

(Thereupon counsel approached the bench and the following proceedings were had:)

The Court: You can prove her mental condition later, but at this time as far as you can go is to show that
40 the implication that she made the request of these witnesses could not have existed, because she was not in any condition to make the request.

Mr. Washington: That is exactly what we are offering to show through this witness' testimony, that she was in

no condition to make any request to anyone at any time concerning her will.

The Court: Well, that is all right.

Mr. Washington: We can go that far on the question of her physical condition.

The Court: Yes.

(Counsel returned to the trial table and the following proceedings were had:)

By Mr. Thompson:

Q. Doctor, in your opinion was Marion E. Sabbs in a position or physical or mental condition—or was her physical or mental condition such that she would be in a position to make a will?

Mr. Branson: I object to that.

By Mr. Thompson:

Q. To make a request for someone to sign a will? A. I don't know whether I can answer that question yes or no.

Mr. Thompson: Well, if the Court please, may he be permitted to explain?

41 The Court: He has already answered that; at the time he signed this alleged will, was the patient conscious?

The Witness: Yes.

By the Court:

Q. Was she able to talk to you about her condition in a rational manner? A. Well, she was rational at times and at other times she was not rational. I mean, I never got a coherent statement of her condition during the whole time she was there.

By Mr. Thompson:

Q. Doctor, did Marion E. Sabbs ever have any conversation with you concerning the signing of this will? A. No.

Q. If you know, did she see you when she signed this will?
A. I cannot answer that; I don't know.

Q. Well, from the position in which she was lying, in your opinion, did she see you? I believe you told us she was lying flat on her back; is that right? A. Yes; that is right. I don't know whether I can answer that or not. I mean, I would have to be looking directly at her to be able to answer that question, and I was not looking at her at the time I signed the will.

By the Court:

42 Q. Did you see Elizabeth Lurton sign this will?

A. Yes; I saw her sign. She was standing at a distance when I saw her; I was not where I could look over her shoulder.

Q. Did she sign it before or after you signed it? A. She signed it after I signed it.

By Mr. Thompson:

Q. Doctor, who requested Mrs. Lurton to sign the will?
A. I did.

Q. You did. Did Marion E. Sabbs ask you to ask Mrs. Lurton to sign the will? A. No, she didn't.

Q. How many pages, Doctor, were there to this alleged paper writing, if you know? A. I don't know.

Q. How many signatures of Marion E. Sabbs did you see on it, sir? A. One.

Q. Now, Doctor, would you identify which one of these signatures did you see, if you can, sir? A. I cannot do that.

Mr. Thompson: Mr. Branson, may I see the paper writing, the one you have there in pencil?

(A document was handed to Mr. Thompson.)

Mr. Thompson: Thank you.

By Mr. Thompson:

43 Q. Doctor, while his Honor is looking at that, did you see this particular writing on May 7, 1950? A. Yes; I saw that.

Q. Did you see anyone sign that? A. No.

The Court: That is not offered.

Mr. Thompson: I am not offering it.

By Mr. Thompson:

Q. Who, Doctor, had these two paper writings? A. Dr. Henderson.

Q. Is he a medical doctor or is that an honorary degree, if you know, Dr. Henderson? A. I don't know.

Q. Then, Doctor, is it my understanding that the only person who talked with you concerning this alleged paper writing was Dr. E. B. Henderson? A. Yes.

Q. And at no time did you hear Miss Sabbs ask Dr. Henderson to ask someone to sign it; is that my understanding? A. Yes.

Q. And that is correct? A. Yes.

By the Court:

Q. Now, Doctor, under what circumstances did you ask Mrs. Lurton to sign this as a witness? A. Well, under the circumstances that Dr. Henderson said she had to have two witnesses to the will, and I told him I would see if I could find another witness on it, and that is it.

Mr. Thompson: Pardon me. Have you finished, your Honor?

The Court: Yes.

By Mr. Thompson:

Q. That was after you had signed? A. Yes.

Q. Then, of your own volition, you went out and brought her in; is that true? A. Yes.

REDIRECT EXAMINATION

By Mr. Branson:

Q. Mr. Henderson asked you in the presence of Mrs. Sabbs, that is true, to have two witnesses to the will; is that correct?

Mr. Thompson: I think the witness should testify.

A. Well, I think it was in the presence of Mrs. Sabbs.

Mr. Thompson: That is a leading question.

The Court: What did you say, Doctor?

The Witness: Well, of course, we were all around Mrs. Sabbs' bed, all of us in the party, at that time. Now, whether I was standing right beside Mrs. Sabbs' bed at the time she asked me or whether I was a little away from it, I mean, I do not recall that.

45 By Mr. Branson:

Q. Mrs. Sabbs understood what she was doing; didn't she?

Mr. Thompson: I object to that.

A. I don't know.

By Mr. Branson:

Q. She signed the will in your presence? A. That is right.

Q. That was after Mr. Henderson had said he needed two witnesses to the will that you signed as a witness, didn't you, Doctor?

Mr. Thompson: I object to that, your Honor. It is a leading question.

Mr. Washington: Your Honor, I think he is trying to cross examine.

The Court: He is testifying now.

Mr. Thompson: That is right.

By Mr. Branson:

Q. You signed the will in the presence of Mr. Henderson and Miss Sabbs; is that true? A. Yes.

Q. And Miss Sabbs signed the will in your presence? A. That is right.

Q. And then, in the presence of Miss Sabbs, Mr.
46 Henderson requested another witness to witness the will.

Mr. Thompson: I object to that, your Honor, and I ask

your Honor to rule on that. He is asking indirectly what your Honor has ruled he could not ask directly.

The Court: The witness stated that Dr. Henderson, or Mr. Henderson, whichever he is, had told him there had to be two witnesses, and then he volunteered to try to get another witness, and he got this Mrs. Lurton to sign the alleged will.

The Witness: That is right.

The Court: Is that your testimony?

The Witness: That is correct.

By Mr. Branson:

Q. You talked with Mr. Washington about this case; didn't you? A. Yes; I did.

Q. And do you remember when you talked with him? A. No; I don't.

Q. You don't recall? A. No; I don't.

Q. Was it prior to June 3, 1950?

Mr. Thompson: I submit he has answered he didn't know when it was, your Honor.

By Mr. Branson:

Q. Was it subsequent to June 3d?

47 Mr. Thompson: I submit he doesn't know when it was, your Honor.

The Court: All right.

Mr. Branson: He may know whether or not it was prior to a certain time.

The Witness: I don't know.

Mr. Washington: We are willing to stipulate we spoke to the witness as an impartial witness to the will, as we always do in will cases.

By Mr. Branson:

Q. Can you give me the approximate date you did?

Mr. Washington: I cannot recall the date, because I made no record of the date, but Mr. Thompson and I are perfectly

willing to stipulate, Mr. Branson, that we did talk to him and Mrs. Haywood talked to him.

The Court: There is no impropriety in talking to a witness.

Mr. Washington: No, but I was wondering why he asked if I had talked to him.

48 By Mr. Branson:

Q. I show you this affidavit of June 3, 1950, and ask you is that your signature on that affidavit? A. Yes, it is.

Q. Do you recall being interrogated about these matters by the Deputy Clerk in the Register of Wills Office?

The Court: Just a minute, let me see that paper, please. (Paper handed to the Court.)

The Court: Now will counsel come to the bench a minute? (Thereupon counsel approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)

The Court: The Court thinks that the fact that she signed this paper and these two witnesses apparently signed in her presence, that is a question of execution and is for the jury. The Court also thinks that to go into the question of unsoundness of mind at this time is not proper. The burden of proof of establishing by a preponderance of the evidence lack of mental capacity is on the plaintiffs, and of course the other witnesses, and I presume the other alleged witness to the will is here—

Mr. Washington: Yes, she is here.

49 The Court: She will testify, but the Court does not think that you ought to go any further. Of course, when the doctor takes the stand later in the case, if he should testify that she was not of sound mind, why you can cross-examine him about this, but at this time the Court does not think it is proper to do it.

Mr. Washington: Your Honor, we have not even seen that. Furthermore, we don't believe we should go into the issue of unsoundness of mind at the present time. We

feel that we should still deal with the question of execution.

The Court: Now are there any further questions?

Mr. Branson: No further questions—just one thing more. I merely think since she has identified the signature—

The Court: The Court presumes that one side or the other will want the doctor later in the case.

Mr. Thompson: Yes.

The Court: You will have to make arrangements with him to come. Of course the doctor cannot stay here all the time.

Mr. Thompson: May I say this, Your Honor, I wonder if Your Honor will recess until tomorrow morning? I have not finished with the doctor. I wonder if you would recess until tomorrow morning. The doctor is a member of the draft board and is supposed to report for duty today.

The Court: Does the draft board meet at 4 o'clock?

Dr. Robinson: I think they meet all day. I think
50 the last session is over at 4:30.

The Court: They can do without you for nine minutes. I am going to go on until 4 o'clock.

Mr. Branson: That is all of my examination with respect to the doctor. I am through.

(Thereupon, counsel resumed their places at the trial table and the following proceedings were had in open court:)

Mr. Thompson: Just one minute, Your Honor, will Your Honor indulge me a minute?

RECROSS-EXAMINATION

By Mr. Thompson:

Q. Doctor, at the time you saw Mrs. Sabbs sign this paper writing what was the effect of the medicine you were giving her?

Mr. Branson: I object. He has not stated any medicine he was giving her. He said everybody was treating her.

The Court: The Court will permit the examination for that purpose.

Mr. Thompson: Answer the question.

The Witness: We were not getting any effect.

By Mr. Thompson:

Q. Were you giving oxygen through the nostrils? A. Yes.

51 Q. Did what you were giving her have any effect one way or the other, Doctor? A. Well, it all depends on what the condition is as to whether—what kind of effect it would give. In this particular instance it was not giving her any effect.

Q. I believe you told us she was incoherent most of the time, is that right?

Mr. Branson: I object.

The Court: He didn't say that, he said off and on, as I understand it.

The Witness: She had periods of lucidity and periods when she was incoherent.

By Mr. Thompson:

Q. What was that last statement? A. I said she had periods of lucidity and periods when she was incoherent.

Q. Have you at any time, Doctor, seen the signature of Marion E. Sabbs any place else? A. No.

Q. To the best of your recollection? A. No.

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239 Thereupon—

ALVIN S. ROBINSON

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

By Mr. Washington:

243 Q. Now, Doctor, as you entered Ward 10 through a short hallway, did you see anyone? A. I saw the nurse and the interne.

Q. Did you speak to the nurse? A. I asked someone at the desk where the patient was located, I don't know whether it was the nurse or whether it was an interne, one of the two.

Q. You are talking about the nurse's desk now? A. That is right.

Q. Where was the patient located, did they make a reply? A. They told me the patient was located on the second bed on the right-hand side of the ward, on the west side of the ward.

Q. In other words, you had the second patient on the west side, the second bed, is that right, Doctor? A. Yes.

Q. Now, Doctor, did you see anyone else as you entered the ward? A. No, I didn't see anyone else.

Q. Doctor, what did you next do, if anything? A. Well, I proceeded to the bed.

Q. And how was the patient at that time, did you observe her condition?

The Court: The doctor said he proceeded to the bed
244 and then you interrupted him.

Mr. Washington: I am sorry, I apologize both to the Court and the doctor.

The Court: Proceed, Doctor.

The Witness: I proceeded to the bed and observed the patient and began to try to get some history as to the onset of her illness at that time.

Q. Now, Doctor, will you tell His Honor and the jury what did you observe about the patient's physical condition at that time, and I recall you said at a quarter to 2, is that

right? A. Yes. Well, it was immediately apparent that the patient was severely ill as evidenced by the fact that she had obvious cyanosis, the obvious blue of the lips—

The Court: Obvious what?

The Witness: Cyanosis, her lips were blue, her manner depressed and apprehensive, and she was obviously suffering from labored breathing. I mean those things that you could see immediately just from a glance, so to speak, it was equally obvious that she had a markedly enlarged abdomen. She was a fairly obese individual.

The Court: Markedly enlarged what?

The Witness: Abdomen.

By Mr. Washington:

Q. Now, Doctor, what was the color of her skin at that time that you noticed? A. Well, her skin had a sort
245 of ashy appearance, I should say the thing that strikes you most was the cyanotic condition.

Q. Now, Doctor, will you tell the jury exactly what you mean by a cyanotic condition? A. A cyanotic condition as far as observation is concerned, means that there is some change from the normal, some portion of the patient's body at this particular time. An individual's ordinary lips have a normal red color, they were markedly blue, and instead of her nail beds being pink in color as one would expect normally, they were markedly blue.

Q. What causes a cyanotic condition? A. Well, one of the causes—well, the cause primarily is a lack of proper oxygen exchange in the blood.

Q. I didn't get all of that, Doctor. A. I said that the lack of oxygen exchange in the blood is the primary cause.

Q. Doctor, at the time you first observed Miss Marion E. Sabbs was she in pain? A. Yes, she was, she was having very severe pain from the very moment she entered the ward, according to the interne's say.

Q. How did you know she was in pain? A. I knew
246 she was in pain because she was complaining about it very markedly, she was quite restless and moved about in bed. That was the chief matter, she constantly made reference to and attempted to indicate that her pain was in the area of the chest.

Q. Now, Doctor, I am sorry, will speak louder, please?

Q. Now, Doctor, describe how she was acting at that time with reference to this pain. Give us a better picture of exactly what she complained about at that time. A. As close as I can recall the patient cried out in pain because it was a very excruciating type of pain, she was constantly, as I said, pointing to her chest, attempting to massage her chest. She would move about on the bed as much as she possibly could seemingly trying to get a position or find a comfortable position and possibly get some relief from this particular pain that she was having.

Q. Now, Doctor, having made these observations as you testified, you tried to get some medical history, did you not?
A. Yes, sir.

Q. Were you successful in getting any medical history from the patient? A. I was not successful in getting a coherent history from her, no.

247 Q. Why Doctor? A. Well, because sometimes she had more difficulty in giving a chronological story as to what preceded her present attack and she was uncooperative from the standpoint and sometimes she made no reply to the interrogation at all, because as I say she was constantly reacting to the severe pain that she was having, so that she was uncooperative, I should say, from that point of view.

Q. What type of questions did you ask her, Doctor? A. Well, I asked her as to the onset of her illness, how it started, how long had she had it and where it originated, and that sort of thing.

Q. So you inquired, Doctor, as to the present nature of the ailment? A. Primarily, yes.

Q. What were you trying to do by way of this interrogation of Marion E. Sabbs, you were trying to determine what, Doctor? A. Well, I was trying to establish a reason or basis for her chest pains.

Q. Were you able to do that at that time? A. No, not satisfactorily, no.

Q. Now, doctor, having made these observations and having interrogated Miss Marion E. Sabbs, what did you next do, if anything? A. Well, I next started to examine her—
248

Q. What examination did you make? A. Well, my first examination was of her abdomen, because my primary interest was in testing—I wanted to satisfy myself as to whether the basis of her problem was in her chest.

Q. Did she have a tumor, Doctor? A. Yes, she did.

Q. And after your examination of her abdominal region, what did you then do if anything? A. Well, after I examined her abdominal region I was satisfied that certainly the tumor was not her major condition at that particular time, so I felt that all of her troubles at that time were—well, shall I say more medical than it was surgical.

The Court: More what?

The Witness: Medical than it was surgical.

The Court: What do you mean by that answer?

The Witness: Well, I mean by that that the patient was sent to me for the tumor condition. Under those circumstances and under the circumstances at the time I saw her, surgery was out of the question and her difficulties I felt were located in either the heart or, in her lungs, so that under those circumstances I felt that one of our medical men should be the one to see her.

249 Q. Doctor, at that time was she suffering from shortness of breath? A. Oh, yes.

Q. Was it severe? A. Moderately severe.

Q. Now, Doctor, having made this examination and having decided that her illness was not in her abdominal re-

gion, what did you next do if anything? A. Well, I next went to the—I left the ward and went to the medical office to see if I could get the chief medical service doctor.

Q. Who was that? A. Dr. J. B. Johnson.

Q. Did you talk with him? A. I did.

Q. What was the nature of your conversation with him?

A. Well—

Mr. Branson: I object to that.

The Court: Objection overruled, the hearsay rule has nothing to do with it. Proceed.

Mr. Washington: Thank you, Your Honor.

The Witness: I related to him as briefly as possible her condition. He was very busy at that time and he asked or at least he told me to get one of the other men to treat her so then I called in the individual that he suggested.

250 The Court: Who was that, Doctor?

The Witness: That was Dr. Keller.

By Mr. Washington:

Q. Did you make the call to Dr. Keller yourself, Doctor?

A. I don't recall, I don't think I did. I think I put that call through the hospital switchboard and I think they called him.

Q. Now, Doctor, did you return to the ward? A. Yes, I did.

Q. Now, Doctor, listen carefully now to this; from the time you went in the ward the first time at a quarter to 2 up until the time you returned to the ward having sought or attempting to seek further consultation with some other physician, did you notice anyone around the bed of the patient, lay person I am talking about? A. No, I don't recall that at all.

Q. Doctor, were there any medical persons other than nurses and internes or doctors, other than yourself? A. Well, the interne may have been around the bed, because we had started to put into process certain things that we

tried to get set up in order to give her some support while we were trying to make a diagnosis, and that is the only thing I can recall.

Q. Can you identify the interne that was there?
251 A. Yes, I can identify him.

Q. Who was he? A. He was Dr. Forcia.

Q. Where is Dr. Forcia now? A. Louisiana, I believe.

Q. Now, Doctor, from the time you entered the ward for the first time at a quarter to 2 until the time you went in the ward for the second time after you saw Dr. Johnson and made this call to Dr. Keller, how long did it take, what was the period, would you say? A. I would say approximately three or four minutes.

Q. Approximately three or four minutes from the time you entered the ward the first time and examined the patient? A. No, no, no, I said possibly thirty minutes.

Q. Thirty minutes? A. Yes.

Q. Now, Doctor, from the time you went in the ward to the second time, which was approximately 15 after 2, is that right, Doctor? A. Approximately.

Q. Now, as you entered the ward the second time did you observe the condition of the patient? A. Well, the patient was still complaining about pain, and her cyanosis was not or did not show any improvement. In other words, she was worsening.

252 Q. What did you say?

The Court: He said she was worsening, she was not improving, it was worsening.

Speak, Doctor, so we can hear you. I cannot hear half what you are saying.

The Witness: I am not normally a loud talker.

That is about all.

By Mr. Washington:

Q. Was she suffering excruciating pain at that time, 15 minutes after 2? A. Yes, she was.

Q. Now, Doctor, having made those observations, what did you next do, if anything? A. I next tried to interrogate her again as to the onset of her illness, and so forth.

Q. Were you successful in getting any part of her medical history at that time? A. No, I was not, not satisfactory.

Q. Now, Doctor, at a quarter after 2 or approximately a quarter after 2, was any apparatus set up around her, that is, were there any instruments near her, or was she receiving any type of medication from any apparatus? A. No, she was not receiving any type of treatment at that time. We had set up the tree or the instrument from which we give
 253 the blood transfusion or saline solution at the head
 of her bed. I don't recall whether the oxygen tank was in evidence at that time or not, but within that short space of time thereafter I think it was.

Q. You mentioned a tree Doctor. What is that? A. It is something like a fishhook, so to speak, turned upside down, exaggerated, like that. Q. You use it for what purpose?

A. We use it just to hand the solution on, hang the bottle filled with solution on.

Q. For what purpose were you using it on that day? A. For the same purpose.

Q. What bottle were you going to place on this tree, or what fluid, rather? A. We were going to place the saline solution on there until we got her typed and cross-matched and find suitable blood for her.

Q. Now, Doctor, having attempted again at a quarter after 2 to secure a medical history from this patient, what did you next do, if anything? A. Well, when I could not get a satisfactory history from my interrogation I went to the telephone and called the patient's doctor who had seen her. So far as I was concerned I had first seen her that day, and I was trying to get some information from him.

The Court: Let's try to get this thing straightened
 254 out. As I understand it, you are primarily a surgeon, is that correct?

The Witness: That is right.

The Court: Her family doctor sent the patient to you, as you understood it, for the purpose of examining this tumor?

The Witness: That is right.

The Court: Now we have gotten that fixed up, go ahead.

By Mr. Washington:

Q. Doctor, did you contact this other doctor, the original doctor, as you call him? A. Yes, I did.

Q. What was his name? A. Doctor Lawrence Jackson.

Q. What conversation did you have with him? A. Well, the conversation I had with him was—well, I related the patient's condition as she presented when she came on the ward and of course my primary interest was had she had a chest condition prior to the time she came into the hospital.

Q. How long did this take, Doctor, if you can possibly estimate, we are trying to get the time? A. Oh, I would say between five and ten minutes.

Q. So that it was around 2:30 then, Doctor. A. Approximately.

Q. Approximately 2:30. Doctor, while you were
255 in—did you telephone Dr. Jackson from the ward telephone? A. I don't recall whether I telephoned him directly or whether again I put the call through the board, more than likely I put the call through the board.

Q. What do you mean you put the call through the board? A. I mean I asked the telephone operator to have him call me on Ward 10.

Q. Now, Doctor, having made this call to Dr. Lawrence Jackson, what did you next do if anything? A. As I recall at that time Mr. Henderson approached me—

The Court: I cannot hear you, Doctor.

The Witness: As I say, as I recall at that time I was approached by Mr. Henderson.

Mr. Washington: Your Honor, excuse me for a second. I said Dr. Lawrence—is his name Dr. Lawrence?

The Witness: His name is Dr. Lawrence Jackson.

By Mr. Washington:

Q. Now, Doctor, what did you next do, if anything? A. I said at that time, as near as I can recall, I was approached by Mr. Henderson or Dr. Henderson.

Q. Is Mr. Henderson in this room, Doctor? Do you see Mr. Henderson—will you stand, please?

(Mr. Henderson stands up.)

256 The Witness: Oh, yes, sir.

By Mr. Washington:

Q. Is that Mr. Henderson? A. Yes, sir.

Q. You were approached by Mr. Henderson? A. Yes.

Q. Was anyone with Mr. Henderson at that time? A. There were two or three women with him at that time.

Q. Are you able, Doctor, to identify what ladies were with Mr. Henderson? A. I am able to identify two of them.

Q. Mrs. Watson, will you stand, please?

(Mrs. Watson stands.)

Q. Was this one of them, Doctor? A. Yes, that was one.

Mr. Washington: Is Mrs. Dobbins in the courtroom?

Mr. Branson: No.

Mr. Washington: Is Mrs. Alexander in the courtroom—will you stand up, please?)

(Mrs. Alexander stands.)

By Mr. Washington:

Q. Is that one of the ladies there? A. I am not positive about that.

Q. Was Mrs. Jessie Lancaster there? A. I would
257 not make a positive identification.

Q. You would not make a positive identification?
A. No.

Q. Now, Doctor, you said you were approached by Mr. Henderson. When did Mr. Henderson first speak to you,

and where were you? A. He spoke to me in the area, I believe, of the nurse's desk.

Q. That is in the short hallway? A. Yes.

Q. Leading into the ward, is that right? A. Yes.

Q. And what did Mr. Henderson say to you? A. As I recall he naturally asked me about Miss Sabbs' condition.

The Court: What did you tell him?

The Witness: I told him she was not doing so well, that we had not arrived at any accurate diagnosis as to where her difficulty was.

By Mr. Washington:

Q. Did he make any further statement to you, Doctor?

A. Then he said that he had a will for her to sign and did I think that it would be—that she would be able to sign it?

Q. What did you say to him? A. I told him that
258 in a little while I thought she might be able to do so.

Q. Doctor, going back again, at that time you left the ward then, Doctor, to call Dr. Lawrence Jackson, was your patient suffering excruciating pain? A. Well, the pain was constant.

Q. Was she cyanotic at that time? A. Yes, she was.

Q. All right, Doctor, from your conversation with Mr. Henderson at the door of Ward 10, what did you next do, if anything. A. About that time I called—let me get my story straight now—at that time I called—the call from Dr. Jackson came through and I stated the conversation that took place between him and me with reference to her present condition and her previous state and sometime in the interim, as I said, I had talked to Mr. Henderson and I asked Dr. Jackson about the will, the propriety of allowing Mr. Henderson to go into the ward for her to sign this will because I didn't know at that time what connection Mr. Henderson had with Miss Sabbs.

Q. Doctor, is it my understanding then that you received a call from Dr. Lawrence Jackson and you asked Dr. Jack-

son there at the hospital about the propriety of the patient,
Miss Marion E. Sabbs, is that right? A. That is right.

259 Q. Doctor, in your opinion and according to your
latest observation of that patient, was she in any
condition to sign a will?

The Court: That is not the question. The real question
is was she, in your judgment, in any condition to execute
a will with acknowledge and understanding, that is the ques-
tion. Isn't that the question?

Mr. Washington: That is the question.

The Witness: No, I don't think she was able to execute
a will with knowledge and understanding, no.

By Mr. Washington:

Q. Now, Doctor, after having this conversation, telephone
conversation with Dr. Lawrence Jackson, what did you next
do, if anything? A. Well, we had started to do certain pro-
cedures, mainly we were trying to cut down into the vein
to start this fluid business with her so I discontinued that
momentarily and brought Mr. Henderson into the ward for
the signing of the will.

Q. You suspended the medical care to bring Mr. Hender-
son into the ward to sign the will? A. Right.

Q. Now, Doctor, at what time approximately did you
bring Mr. Henderson over to Marion E. Sabbs' bedside?

A. It probably was around 3 o'clock or near that
260 time.

Q. Near 3? A. Yes.

Q. Now, Doctor, did you notice or did you observe Marion
E. Sabbs at that time? A. Yes.

Q. Was there any change in her condition? A. No, pro-
gressively getting worse.

Q. She was progressively getting worse? Doctor, at that
time was that curtain drawn around the bedside? A. Yes,
it was.

Q. And at that time you were applying some type of medi-

cation, is that right? A. We had not started the oxygen therapy on her.

Q. Oxygen therapy? A. Yes.

Q. How about the saline solution? A. No, we had not started that yet.

Q. And you brought Dr. Henderson up to the bedside?

The Court: Do you mean Mr. Henderson or Doctor?

Mr. Washington: It is Dr. Henderson, I think he is a Doctor of Philosophy.

Mr. Henderson: Of Education.

The Court: All right.

261 Mr. Washington: Dr. Henderson, thank you.

By Mr. Washington:

Q. You brought Dr. Henderson up to the bedside? A. Yes.

Q. Now, Doctor, I want you to describe, if you can, what happened next? A. Well, he came up to the bedside and greeted Miss Sabbs.

Q. Who had the will, Doctor, if you know. Who had the purported will? A. Mr. Henderson, so far as I know.

Q. Mr. Henderson, so far as you know, had the purported will in his hands? A. Yes, I think so.

Q. All right, and where did Mr. Henderson go at the bedside of Marion E. Sabbs? A. He went to the head of the bed on the right side.

Q. And where did you go, Doctor, if you recall? A. If I recall, I went to the head of the bed on the opposite side.

Q. On the opposite side? A. Yes, he was on the right side and I was on the left side.

262 The Court: He said Dr. Henderson was on the side of her right arm and he was on the side of her left arm.

Mr. Washington: That is right, Your Honor, I understand perfectly. I am trying to get the picture as to the—

The Court: That is the best picture I know anything about, go ahead.

By Mr. Washington:

Q. All right, Doctor, what did you observe next, if anything? A. As I said he greeted her and she replied to his greeting and as close as I can recall he asked her how she was feeling as she was still complaining about her painful condition, how painful her chest was, and as I can recall I think she asked him what we were going to with her or something to that effect. That is all I can recall of that conversation.

Q. Now, Doctor, when you say he greeted her what did Mr. Henderson say to Miss Marion E. Sabbs? A. I think he said, "Hello, Marion," or something to that effect.

Q. And what did she say to him? A. She said, "Hello, Ed."

Q. How soon after he said, "Hello, Marion," did Marion E. Sabbs say "Hello, Ed"? A. Oh, within a few seconds.

263 The Court: The Court understood you to say she asked him what he was going to with her.

The Witness: No, she didn't ask him that, she asked him what we were going to do.

The Court: All right.

By Mr. Washington:

Q. How long did it take her to respond to Mr. Henderson's greeting, Doctor?

Mr. Branson: He has answered that.

Mr. Washington: Well, I want to find out.

The Witness: It was a matter of seconds.

By Mr. Washington:

Q. Would you call it a normal response? A. I just don't know, I don't recall that much detail about it.

Q. Well, Doctor, would it be a response you would make to me if I said, "Hello, Doctor"? A. No, no, it could not be.

Q. Was it longer, was it hesitant? A. Well, say it was hesitant, that is a good term.

Q. At that time, Doctor, was Marion E. Sabbs in excruciating pain? A. Yes, she was still having pain, I could not say, it may have abated somewhat at that time.

Q. What gave you the impression it may have abated somewhat at that time? A. Her reaction was not
264 as great as it had been prior to that time.

Q. Was she still cyanotic? A. Still cyanotic.

Q. Did you notice any general improvement in her? A. No.

Q. All right, Doctor, then what happened next, or what did you observe next? A. Then I think he told her that he had a will to be signed and as close as I can recall he presented the last page of the will for her to sign, and I don't know whether he held the book for her to sign it on or whether I held the book or the chart or whatever it was.

Q. Now, Doctor, with reference to the statement, "I have your will for you to sign," or words to that effect, what did Marion E. Sabbs do; did she indicate in any manner a response to that? A. I don't recall that she did anything, I don't recall any conversation that went on.

Q. Now, Doctor, what did Mr. Henderson do with the will after that statement of Mr. Henderson? A. Well, as I said, after the statement, as close as I can recall, he presented her with the last—

Q. Well, Doctor—

265 The Court: Well, let him answer, please.

The Witness: With the last page and indicated where she was to sign.

By Mr. Washington:

Q. All right, Doctor. Now what did you mean by presented. Tell us exactly what you mean by "presented"? A. I mean put it before her face.

Q. Did she reach for the will or did he put it in her hand?

A. Well, she didn't reach for it, no. As I recall he must have put it in her hand.

Q. Now, Doctor, who put the pen in her hand?

The Court: What do you mean, pen?

Mr. Washington: The pen for her to sign with.

The Witness: Mr. Henderson put the pen in her hand for her to sign.

By Mr. Washington:

Q. Where were you at that time, Doctor? A. I was still in the same position.

Q. Over on the opposite side of the bed, is that right? A. Yes.

Q. Now, Doctor, did you see her sign her signature? A. Yes, I did.

Q. You saw her sign her signature? A. Yes.

266 Q. Describe if you can the manner in which she signed her signature to the will. A. Well, it was quite evident that she was struggling for muscular control; her signature was slow and more or less, shall we say hesitant as if she was trying to form the letters to the best of her ability.

Q. Was she suffering this excruciating pain, Doctor, at that time, from your own observation? A. I could not say that the pain was excruciating at that time, she still had the pain, but as I say, the pain became more severe each spasm, shall I say.

Q. Going off and on? A. Yes.

Q. She was cyanotic at that time, was she? A. Yes, she was.

Q. After she finished her signature what did she do with the pen? A. I don't recall what she did if anything with it, as close as I can recall the pen was taken from her by Mr. Henderson.

Q. What did she do with the paper she signed?

The Court: The doctor said she never had hold of the paper, sir.

By Mr. Washington:

Q. She never had hold of the paper? A. That is
267 right?

Q. All right. Now, Doctor, how many signatures did she make on that will? A. I cannot recall but one.

Q. Now, Doctor, if you will please, place the time again, at what time or approximately what time did this alleged signing take place? A. It must have been around between 3:10 and 3:15, in that area.

Q. And who except Mr. Henderson was behind that screen with you? A. No one else.

Q. No one but you, Mr. Henderson and Marion E. Sabbs, is that right? A. That is right.

Q. Now, Doctor, after Miss Marion E. Sabbs signed the will, did you have any further conversation with Mr. Henderson concerning the matter? A. No.

Q. Did you sign at that time? A. Yes, I think he said, as I recall, words to that effect, legally—

The Court: You think what?

The Witness: I think that he said legally or words to that effect, that two people had to witness the will, had
268 to be witnesses to the signature.

By Mr. Washington:

Q. Did you sign the will, Doctor? A. I did.

Q. And where did you sign it? A. In the area where at the bottom of the page, where it says witnesses.

Q. Did Miss Marion E. Sabbs ask you to sign the will, Doctor? A. No.

Q. Did she say "You sign this," Doctor? A. I don't know, because at that time I was—

Q. Now, after she signed the will— A. As I said, I don't know, because at that particular time I was being over her, standing beside the bed, putting my signature on the will.

Q. Now, Doctor, I am sorry, I apologize, let us go back for one moment, back to the time that Miss Sabbs signed the will. Now after she completed her signature on the paper which purported to be this will, what did she do? Did you observe her condition then, her reaction to her signature? A. After she signed it she more or less relaxed, so to speak.

269 Q. Like exhaustion? A. Somewhat.

Q. And the pen relaxed and was taken away from here? A. That is right.

Q. All right. Doctor, did you have any further conversation with Mr. Henderson after you signed the will? A. As closely as I can recall he said there would have to be another witness and I said I would get the head nurse who happened to be Mrs. Lurton to witness the signature.

Q. And what did you do, Doctor, then? A. Then I went out into the nurse's area and called Mrs. Lurton and asked Mrs. Lurton to witness the will.

Q. What did she say in response to that request? A. She said she would.

Q. And what did she do then, Doctor, if anything? A. Then she came back into the ward and proceeded to Miss Sabb's bed.

Q. Did you follow her?

The Court: She proceeded to Miss Sabbs' bed and what?

The Witness: Signed the will.

The Court: Let me ask you this if you can answer it, were you close enough to know whether Miss Sabbs requested her to sign this will; did you hear Miss Sabbs request her to sign the will?

The Witness: No, I didn't.

270 The Court: And if she had asked her to sign the will were you close enough to have heard it at that time?

The Witness: Well, let me put it this way, I was at the foot of the bed within the area of the foot of the bed. Now

if she said that she could have said it in a very low voice and since Mrs. Lurton was near the head of the bed—I mean she may have said it in a sort of whisper like and it would have been impossible for me to hear it.

The Court: Your answer then is you don't know whether she said it or not?

The Witness: No.

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272 Thereupon—

ALVIN S. ROBINSON

resumed the witness stand and was examined and testified further as follows:

DIRECT EXAMINATION—Resumed

By Mr. Washington:

Q. Doctor, I believe when we interrupted your testimony you had just stopped the description of the signing of the will by Miss Marion E. Sabbs, you signed the will and Mrs. Lurton signed the will and you testified to the effect that you didn't hear the testatrix, that is Marion Sabbs, say anything to anyone concerning the will, is that right? A. Yes, that is right.

Q. Now, Doctor, after the transaction was completed, after Mrs. Lurton signed the will, do you recall who took possession of the will? A. Mr. Henderson took possession of the will.

Q. Do you recall what time that was? A. No, I don't.

Q. All right, Doctor, going back to your patient now, did you proceed with the medication or with the medical attention that you had suspended during the will transaction? A. Yes, we did.

Q. All right, Doctor, will you describe to the Court and jury exactly what you did? A. Well, we attempted
273 to introduce a saline solution into her veins but because of the lack of the existence of blood pressure

her vascular system, so to speak, had collapsed so that it was difficult to try to find a suitable area in which to introduce a saline solution, so under those circumstances we had to bisect what we call the anticubular process in order to get a suitable vein to introduce the fluid.

Q. Do I understand you mean, Doctor, that you cut into the arm? A. Cut into the arm.

Q. Did you go into both arms? A. Yes, we cut into both arms.

Q. Did you eventually find a vein? A. Yes, we eventually found one.

Q. How long did that take to find the vein, Doctor? A. Approximately 15 to 20 minutes.

Q. Doctor, at that time how many doctors and nurses were engaged in attempting to locate a vein through which to apply this fluid? A. There were three of us.

Q. Who were they? A. Dr. Keller, Dr. Swan and myself.

Q. And were some of you working on one arm? A. That is correct.

274 Q. And the others on the other? A. That is correct.

Q. Who found the vein eventually after 15 or 20 minutes? A. I found it on the right side, to be considered suitable.

Q. Now, Doctor, before this cutting began in order to find a vein in order to apply this fluid, did you apply any local anesthesia of any kind? A. Yes.

Q. What did you use? A. I am somewhat hazy on that, I don't know whether it was a local anesthetic or not, because this particular patient's condition was such that she didn't need too much anesthesia of any kind that we may have used under normal conditions that day, I cannot recall.

Q. Did she respond in any way to the cutting of her arm, if you can recall?

The Court: Did she flinch, that is what he means.

The Witness: I cannot recall that there was any flinching.

By Mr. Washington:

Q. Doctor, did you notice the flood flow in the arm you cut on? A. Well, due to her non-existent pressure there
275 was practically no blood flowing at all, and whatever blood flow was present was very dark.

Q. And, Doctor, all this took place immediately after the signing of the will? A. Yes.

Q. Doctor, after you had secured the vein and you made the insertion of the fluid in that vein, was there any improvement in the patient? A. No, her condition was growing steadily downhill.

The Court: As the Court understands it, from the time you first saw her until she died there was complete deterioration, is that correct?

The Witness: That is correct.

By Mr. Washington:

Q. Doctor, what is saline solution? A. Salt.

Q. Is that what you call lifeblood at times? A. Commonly called life water, but that is a misconception, that is what it is called.

Q. Did you give her a blood transfusion at that time, Doctor? A. At some time we attempted to start the flow into the other arm. Q. Did you ever manage to get a complete medical history of this patient, Doctor? A. No,
276 we didn't, not from her.

Q. Not from her at all? A. No.

Q. Was there a complete deterioration, a gradually going down and down in this case, Doctor? A. Yes, sir.

Q. Did you work with her until she died, Doctor? A. That is right.

Q. When did she die, Doctor? A. She died at approximately 4:30.

Q. She died at approximately 4:30? A. Yes.

Q. How long after the signing of the will was that, Doc-

tor? A. That was about an hour after the signing of the will, within that area.

Mr. Washington: Will the Court indulge me for a second?

The Court: Certainly.

Mr. Washington: No further questions.

CROSS-EXAMINATION

By Mr. Branson:

Q. Doctor, do you recall testifying on the 15th, and I ask you if you recall making this statement in response to what the Court said:

“Well, of course, we were all around Miss Sabbs’
277 bed, all of us in the party at that time, not whether I was standing right beside Miss Sabbs’ bed at the time she asked me or whether I was a little away from it—”

Mr. Washington: Just one minute.

Mr. Branson: Does that refresh your recollection with respect to whether or not she had requested you to sign the will?

Mr. Washington: Just one minute, before you answer may we have the page from which Mr. Branson is reading?

Mr. Branson: Page 43.

Mr. Washington: Thank you—wait just a minute before you answer.

Mr. Branson: That is the bottom of the page—at the time she asked me whether—

Now does that refresh your recollection as to whether or not she did ask you to sign the will?

Mr. Washington: May it please the Court, he has not read this question correctly.

The Court: I have no recollection of his ever having said she asked him.

Mr. Branson: It is in the testimony.

The Court: Just one moment. He said Dr. Henderson asked him to sign the will, that is what he said on the first day of the trial.

278 Mr. Branson: Yes, sir, that was his direct testimony. Now this is what comes as a result of Mr. Thompson's examination in his redirect examination found at page 43 of the record, and this is where the witness slipped, and he said she asked me.

The Court: You must not make a statement of that kind, that the witness slipped.

Mr. Branson: That is his testimony in the record.

The Court: That is different. Proceed.

Mr. Washington: This record here—this answer was a result of a question which Your Honor asked, and not Mr. Thompson, Mr. Branson or anyone else. Here is the record.

Mr. Branson: All right, that is what the record shows.

Mr. Washington: The record does not show that.

Mr. Branson: Did you make such statement?

Mr. Washington: Let His Honor rule, let him look at the record.

The Court: Well, let him answer.

The Witness: I have never said that Miss Sabbs asked me to sign the will, I never made any such statement as that.

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280 Thereupon—

ALVIN S. ROBINSON

resumed the witness stand and was examined and testified further as follows:

CROSS-EXAMINATION—Resumed

By Mr. Branson:

Q. You had just stated that at no time did she request you to sign the will prior to adjournment for recess. Did you at any time make a statement that she acknowledged it to be her will?

The Court: What is that question?

Mr. Branson: Did he at any time make that statement.

The Witness: I cannot recall that I did.

The Court: A statement of what?

Mr. Branson: That she acknowledged it to be her will.

The Court: Well, under the rules of evidence he is a will witness, you will have to give him the time, the place and the circumstances.

Mr. Branson: June 3, 1950, in the District Court of the United States in the Register of Wills Office did you, Doctor, make the statement that the acknowledged it to be her will and signed it in your presence? A. The only
281 recollection I can make of that was that I tried to clearly point out that she was constantly asking me did I see her sign the will and I replied in the affirmative to that particular statement, yes, I did see her sign the will. Now as to whether she acknowledged it, I have no recollection of that specific instance.

By Mr. Branson:

Q. Did you at that time then make a statement that you believed she was of sound and disposing mind and capable of executing a valid will, deed or contract? A. I specifically did not make that statement.

Q. I show you this and ask you if this is your signature? A. Yes, that is my signature.

Mr. Branson: I now offer in evidence as a record of this court showing his previous statement and ask leave to read it to the jury.

Mr. Washington: I object to it prior to my seeing what it is.

Mr. Branson: That is proof of the will.

Mr. Washington: May I read it?

May I ask some question on this point relative to this particular instrument?

The Court: Not at this time. You can at the proper time if you wish.

282 Mr. Washington: For the record I would like the record to show that I object to it at this particular time.

The Court: It will so show.

Mr. Branson: May I have this marked as Defendant's Exhibit No. 2?

(Document was marked Defendants' Exhibit No. 2 and received in evidence.)

Mr. Branson: May I read this at this time to the jury? This is Defendants' Exhibit No. 2.

"District of Columbia: to-wit:

"On this 3rd day of June, in the Probate Court—
On this 3rd day of June, A. D. 1950, personally appeared Alvin S. Robinson who on oath says—"

Mr. Washington: I object, just a minute.

Mr. Branson: "Who on oath said he is one of the subscribing witnesses to the foregoing paper writing dated the 19th day of April, A. D. 1950, and witnessed May 7th, 1950, purporting to be the last will and testament of Marion E. Sabbs, late of the District of Columbia."

Mr. Washington: What is that word?

Mr. Branson: "Deceased, late of the District of Columbia, that the testatrix therein named signed the said will in his presence; that the said testatrix published, pronounced and declared the same to
283 be her last will and testament and that at the time of so doing said testatrix was to the best of affiant's apprehension of sound and disposing mind and capable of executing a valid deed or contract and that affiant's name as witness to the aforesaid will as signed—"

Mr. Washington: Not as signed, Mr. Branson.

Mr. Branson: "Was signed in the presence and at the request of the testatrix and in the presence of Elizabeth H. Lurton and the other subscribing witnesses who also signed in the presence of the affiant and in the presence and at the request of the testatrix and

affiant avers that said instrument was in fact so attested by him as a subscribing witness on May 7, 1950."

By Mr. Branson:

Q. You signed that affidavit, did you not? A. Yes, sir.

Q. Now in view of that fact and having had your recollection refreshed with respect to the contents of the affidavit, do you want to change your testimony? A. Well when—

Q. You can answer yes or no and then explain.

The Court: Let him answer the question in his own way.

Mr. Branson: We would like to have a responsive answer.

284 The Court: Let him answer the question. Proceed.

The Witness: The only qualification I would make in that particular statement, as I told Mr. Shipp at the time, that he talked to me several times, that I was not going to say that this patient at that time—I was not going to say that this patient was mentally competent to understand what was going on in so far as that will was concerned.

Now in so far as her muscular activity was concerned, so far as her actual signing, then I said from that particular point of view, she was able to sign, but I tried to make it as clear as I possibly could that I was not going to pass judgment on the patient's capacity from a mental standpoint.

Q. This statement was read to you by Mr. Marques, was it not? A. Yes, I suppose so.

Q. And you signed it after he read it to you? A. Yes.

Q. He specifically outlined each item that has been outlined in the affidavit and questioned you about it?

285 A. I don't recall that, I recall the swearing in process, but I don't recall each item in the affidavit was outlined. The gist of this thing to me was that I was signing a statement to the effect that this patient signed the will. That was my impression of what I was signing.—

Q. You knew you witnessed the will, didn't you? A. Yes.

Q. You had had medical jurisprudence? A. Sometime ago.

Q. And you know that mental capacity is one of the elements with respect to a witness signing a will, don't you?
A. Well—

Mr. Washington: I object to that, Your Honor.

The Court: This a cross-examination. Answer the question.

The Witness: Well, I recall the implications of this particular thing were not uppermost in my mind, at the time of this patient's illness I was primarily concerned with her medically, and I gave no thought to the various legal implications that would arise nor did I have any idea of the background of this particular case.

By Mr. Branson:

Q. Do you recall when Mr. Henderson first came there he specifically requested you and the doctor who was then in charge of Miss Sabbs as to whether or not you
286 believed in your medical opinion that she was able to execute a will, you recall that, don't you? A. Well, he asked me did I think she was able to sign the will, that is the only recollection I have on that particular point.

Q. Do you remember talking to Dr. Jackson about whether or not she could sign? A. No, I didn't ask Dr. Jackson whether she could sign it or not. I specifically stated that I asked Dr. Jackson as to the propriety of letting Mr. Henderson go in to have her sign the will, as I said previously. I didn't know Mr. Henderson's connection with this particular family, whether he was a relative, or whether he was a brother-in-law or what he was, he just came up to me and asked me could she sign the will. I wanted to find out, try to find out, what connection he had with the family.

Q. Do you know Dr. Thornton? A. Yes, I know Dr. Thornton.

Q. He is a very good friend of yours? A. Friend of mine, yes, good friend.

Q. And you know one of the caveators in this case is his sister-in-law, Mrs. Thornton, do you not? A. I know of her, I don't know Mrs. Thornton.

Q. Did you subsequent to May 7 ever have occasion to discuss this question of your signing as a witness to this
287 will with Dr. Thornton, the brother-in-law of one of the plaintiffs here on occasion? A. I cannot recall that I did.

Q. Would you say positively that you didn't? A. No, I would not say positively that I didn't.

Q. Now at the time you were in the Register of Wills Office on June 3rd the will was then shown to you, wasn't it, exhibited to you by Mr. Marks? A. I don't know, it may have been, I don't recall.

Q. Now, were you in the hospital at the time the patient arrived or did you come in subsequent thereto? A. No, I was always there.

Q. I didn't hear you. A. I say I was always present in the hospital when she came.

Q. Were you in Ward 10 or did you receive your call through the hospital office? A. I received my call through the hospital office.

Q. After you received your call how long was it before you went down to the bedside of Miss Sabbs? A. No longer than it took me to proceed from where I was to the ward where she was located, I would within the space of about five minutes.

Q. Had she been placed in bed at that time? A. That is correct.

288 Q. You saw Miss Tyree there? A. Yes, I think I saw her there.

Q. You saw Mrs. Lurton there? A. Yes.

Q. They were. Subsequent to your seeing the patient they did the necessary things, such as setting up the clyses and preparing it for the doctor's use? A. Yes, one or the other of them, I don't recall which one it was.

Q. They were constantly with the patient and the patient was constantly under their observation, that is true, is it not? A. No, I could not say that is true. First one of them after Miss Tyree admitted the patient and did the necessary admission things that one has to do, I think she left the ward, I don't know whether she went to lunch or where she went, but there were only two nurses on the ward at that time, Miss Tyree and Mrs. Lurton and it is a full capacity ward. It is impossible to say that she was with this particular patient all the time, because there were other patients on the ward who were ill and some attention had to be directed to those patients. I could not say she was constantly there.

Q. Well, this pulmonary embolism was something which arose suddenly, was it not—at the time that she was admitted to the hospital she was admitted for the purpose of surgical treatment by you, is that correct?

289 A. That is correct.

Q. She was quite alarmed and afraid, was she, at the time she was admitted and when you first saw her? A. I would say she was apprehensive.

Q. I didn't hear you. A. She was apprehensive.

Q. She was apprehensive? A. Yes.

Q. And by apprehensive you mean she was worried about what was going on, she appreciated that something was wrong with her that made her apprehensive or timid? A. No, I would not say that, no. I know by the fact that she was apprehensive, I mean that she was in the hospital, she had never been in the hospital before, she was around strangers and she wondered what was happening, and I mean she showed a fear, I might say, of the bustling around, so to speak.

Q. You were called by Dr. Jackson for the purpose of operating on her? A. Yes.

Q. What particular type of surgery do you specialize in?

A. Gynecology, that means diseases peculiar to the female organs.

290 Q. Now all of the getting ready of the clyses and the intravenous injection was simply done subsequent to the execution of the will? A. To the best of my recollection it was, yes.

Q. Now are you positively sure that the catheter was injected in her nose and that she was receiving oxygen at the time of the execution of the will or did that happen subsequent to the execution of the will? A. No, my recollection is we had started the oxygen, that was one of the first things we did, was to start oxygen before we started his other business.

Q. I think you made the statement she was suffering from shock? A. Yes.

Q. Now a person suffering from shock could talk, give symptoms and know everything that was going on around them? A. That depends on the degree of shock.

Q. And what degree of shock would you say that would be that they would not be able to do it? A. I would say if she was in deep prolonged shock that she would not be able—any patient who does not have blood pressure and has not had any recorded blood pressure for a long period of time, so far I am concerned that patient is in deep shock.

Q. You say that would affect her sensorially?
291 A. Yes.

Q. Some medical authorities disagree with you, don't they, Doctor? A. It is debatable.

Q. It is debatable. Did you see Dr. Swan there? A. Yes, he was there.

Q. Now you remember when the will was signed Mr. Henderson ran out of ink, didn't he, do you recall that? A. I don't know, he may have.

Q. Do you recall that he borrowed your pen? A. I don't recall that either, he may have, I don't know.

Q. He was very vague about all that?

Mr. Washington: I object to that.

The Court: You ought not to make comments of that kind.

Mr. Branson: I apologize, Your Honor.

Mr. Thompson: May I see these exhibits, please, Defendant's No. 2?

REDIRECT EXAMINATION

By Mr. Thompson:

Q. This Defendant's No. 2, which I now hold in my hand, Dr. Robinson, did Mr. Shiff get you and take you down to the Register of Wills Office? A. Yes, he did.

Q. And did Mr. Shiff represent, did he not, the
292 legatees and devisees of this will, is that true, sir, if you know? A. Yes.

Q. I show you this Exhibit No. 2, did you type it out? A. No.

Q. I mean typewrite the material that is there? A. No.

Q. Were you present when anyone else typed it out? A. No, I was not.

Q. Did you, sir, go first to Mr. Marks' office in the United States District Court in the building across the street that particular day on which you say you signed this? A. Did I go first to his office?

Q. Did you go along with Mr. Shiff to Mr. Marks' office and sign this paper? A. Oh, yes.

Q. And that paper was prepared when you signed it, is that right? A. Yes.

Q. About how long were you in Mr. Marks' office to the best of your recollection? A. Five minutes at the most.

Q. Five minutes at the most, and were there other lawyers or persons in there? A. No, nobody but Mr. Marks and Mr. Shiff and myself.

The Court: You will have to speak up.

293 The Witness: Nobody but Mr. Marks, Mr. Shiff and myself.

By Mr. Thompson:

Q. Just the three of you, is that correct? A. Yes.

Q. Did you at that time read the paper that was handed to you for reading? A. I may have glanced at it, I don't recall that I read it completely other than that.

Q. But you did sign it? A. Yes.

Q. Was it your understanding that this a form sheet? A. Yes.

Q. Dr. Robinson, what did you tell us you specialized in? A. Gynecology and obstetrics.

Q. Is it your testimony that this particular patient was referred to you? A. Yes.

Q. And was she referred to you by Dr. Lawrence Jackson? A. No, she was referred to me by Dr. Samuel Bulloch.

Q. When did you have your first conversation with Dr. Samuel Bulloch with reference to this patient? A. Sunday morning.

294 Q. And as a result of that conversation what happened, sir. A. As a result of that conversation she was hospitalized as my private patient.

The Court: Haven't we been all over that?

Mr. Thompson: There is one little connecting link that I am trying to connect up.

The Court: All right.

Mr. Thompson: If Your Honor thinks I have gone far enough I will be glad to stop.

The Court: So far as I know he has been over that.

Mr. Thompson: No further questions.

RECROSS-EXAMINATION

By Mr. Branson:

Q. Wasn't it the mechanics of your actually going to the Register of Wills Office that you appeared before a girl in the office of the Register of Wills there and she showed you the paper writing and asked you the questions and typed

them as you answered the questions, isn't that correct?

A. I don't recall that.

Q. You don't recall how it was done? A. No.

Q. Or what was said? A. No.

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52 Thereupon—

MRS. ELIZABETH LURTON

was called as a witness by the caveatees and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Branson:

Q. Will you speak up loud and give your full name to the jury and His Honor and your address? A. My name is Elizabeth H. Lurton and my address is 1111 Columbia Road, Northwest, Apartment 308.

Q. Where are you employed? A. Freedmen's Hospital.

Q. How long have you been so employed? A. Fourteen years.

Q. Now directing your attention to the 7th day of May, 1950, did you see Marion E. Sabbs at the hospital?

Mr. Thompson: If Your please, I object to the leading question. If she knows the date I respectfully submit she should give us it, if she wants to refresh her recollection well and good, but Mr. Branson is asked her about May 7, 1950.

The Court: The Court does not see any objection to that question.

Mr. Thompson: Very well, Your Honor.

53 By Mr. Branson:

Q. Did you see her there on that day? A. I did.

Q. How I show you this and ask you to identify your signature, is that your signature? A. Yes, it is.

The Court: Let me have it for just a minute.

(Paper handed to the Court.)

The Court: Now under what circumstances did you sign your name?

The Witness: I was asked to sign my name as a witness to the signature of Mrs. Sabbs by signing my name.

The Court: Who asked you?

The Witness: Dr. Robinson and Miss Sabbs.

The Court: Miss Sabbs asked you?

The Witness: She asked me.

Mr. Branson: That is all at this time. I wish to introduce the purported will into evidence as the last will and testament.

The Court: Well, there has been no cross-examination yet. You would better wait.

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55 Thereupon—

MRS. ELIZABETH LURTON

resumed the witness stand and was examined and testified as follows:

Mr. Branson: Mrs. Lurton was on the stand. I would like to call Mrs. Lurton to the stand subject to counsel's cross-examination—your witness.

CROSS-EXAMINATION

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By Mr. Thompson:

Q. I believe you told us yesterday on direct examination that you were connected with Freedmen's Hospital, is that correct? A. That is correct.

Q. In what capacity, Mrs. Lurton? A. Head Nurse, Ward 10.

Q. Do you have head nurses on all wards up there? A. That is correct.

Q. How long have you been head nurse in Ward 10? A. Ten years.

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58 Q. Now, Mrs. Lurton, calling your attention to May 7, 1950, were you on duty? A. Yes.

Q. And did there come a time when you signed a paper writing? A. A paper writing?

Q. Yes, the piece of paper—pardon me, may I have the will?

The Clerk: Do you want the original?

By Mr. Thompson:

Q. Referring to what is ordinarily called a will. A. Yes.

Q. Very well, when did you first—who signed it first, you or Dr. Robinson? A. Dr. Robinson signed it first.

Q. Did you see Dr. Robinson sign the will? A. No, I didn't.

59 Q. Who asked you to sign it? A. Dr. Robinson and Miss Sabbs.

Q. You volunteered Miss Sabbs yesterday on direct examination when Mr. Branson asked you who signed it.

Mr. Branson: I object to the term volunteered. She was merely asked a question, there was no volunteering.

The Court: She was asked yesterday who asked her to sign and she said something about Miss Sabbs.

The Witness: Miss Sabbs.

Mr. Thompson: But before she said Dr. Robinson and Miss Sabbs.

The Court: Yes, that is right.

By Mr. Thompson:

Q. Where were you when Dr. Robinson asked you to sign? A. I was at my desk.

Q. Will you tell us specifically how far the desk is from the bed where Mrs. Sabbs was, picking out something in this room to indicate. A. From here to the first desk there.

Q. This far (indicating), is that right? A. Yes.

Q. Was a curtain around the bed of Miss Sabbs? A. Oh, yes.

Q. And Dr. Robinson came out there and asked you
60 to come inside and sign it, is that right? A. Yes.

Q. What position was Miss Sabbs sitting in when you came into this enclosure? A. What do you mean, what position?

Q. Was she sitting up, walking around or dancing or what? A. She was hardly dancing, she was sitting at an almost 45 or 60 degree angle in the bed.

Q. Sitting up. Was there anything behind her? A. Of course, there was a back rest.

Q. A back rest? A. Yes.

Q. Was she being given any type of medicine? A. No, not at that time.

Q. Can you tell us the time, please, to the best of your recollection? A. It was between 3 and 3:15, I should say.

Q. Between 3 and 3:15. Do you know what time of day she died? A. Yes, I do.

Q. What time? A. 4:20.

Q. 4:20?

The Court: What time did you say it was when you signed this paper?

61 The Witness: It was about 3 o'clock, I am not certain, we were screened off, probably a little before that.

By Mr. Thompson:

Q. All right, who was present in the little enclosure when you signed this will? A. Mr. Henderson.

Q. Will you please speak up? A. I am sorry, I have a cold, Mr. Henderson.

Q. Mr. Henderson? A. Dr. Robinson and the interne, I believe, who was Dr. Forshea.

Q. All of them were right inside the enclosure when you signed? A. Yes.

Q. What did you write it on, did you have it in your hand like that or put it on the bed or table or up against the wall or what? A. It was on the bed.

Q. It was on the bed? A. Yes.

• • • • •

73 By Mr. Thompson:

Q. Will you tell—

The Court: Just a minute, let me have that paper, please.

Did you see Mrs. Sabbs sign this paper?

The Witness: No, I didn't see her sign it.

The Court: She did not sign it in your presence?

The Witness: It was not in my presence, no, at the time it was signed.

The Court: Had it already been signed before you signed it?

The Witness: She had signed it, Dr. Robinson had signed it—

The Court: You have no personal knowledge that she signed it at all, is that right, you didn't see her sign it?

The Witness: No, I didn't see her sign it.

Mr. Thompson: We rest.

REDIRECT EXAMINATION

By Mr. Branson:

Q. Did she say that she had signed?

Mr. Thompson: I object to that, Your Honor. I object

to his trying to impeach his own witness. She has made the statement that she didn't see her sign.

Mr. Branson: The question is did she acknowledge
74 it to be her will?

The Witness: She did very definitely.

By Mr. Branson:

Q. Did she say she had signed it? A. She said I wish you would witness the signature of my will.

Mr. Thompson: Will you repeat that answer you just gave a minute ago?

The Witness: She asked me to witness the signature on her will by signing my name.

Mr. Thompson: By signing your name, but at no time did you ever see her sign it?

The Witness: I didn't see her sign it.

Mr. Thompson: The information you got that someone wanted a paper signed was from Dr. Alvin Robinson?

The Witness: Dr. Robinson's name—

Mr. Thompson: Yes, I know Dr. Robinson did come outside to your desk, a distance from that wall to the first rail, and asked you to come in and sign this, is that right? A. Yes, he asked me to sign.

Mr. Branson: Also Miss Sabbs asked you to come in and sign it?

The Witness: I was waiting for him to get through.

Mr. Branson: You said you were through.

By Mr. Thompson:

75 Q. Now if you will put your glasses on again, please, you have testified these two signatures appear similar. Now by looking at them with your glasses will you tell the Court and jury if they look similar to you? A. Very definitely so.

Q. Very definitely so, does that look like Marion E. Sabbs' signature? A. They look alike and the Sabbs are alike.

Q. The Sabbs are alike? A. Yes.

Q. Have you seen Marion Sabbs' signature any place else?

A. No.

Q. Now, that paper that you signed, was it typewritten?

A. No.

Q. Was it many or few pages or a single pages? A. They were a few pages.

Q. Were they attached? A. I don't know—they were evidently, because they didn't fall apart.

Q. You started to say you don't know? A. I don't know, but they were all together.

Mr. Branson: I object to counsel interjecting his own opinion in that question.

Mr. Thompson: I apologize. Will Your Honor
76 make a ruling on that?

The Court: I don't think you have done anything to apologize for. You have not done anything wrong yet that I know of.

By Mr. Thompson:

Q. You started to say you didn't know. Just tell us yes or no, and then explain it. A. I started to say I didn't know but when you asked me to explain—

The Court: Let her finish.

Mr. Thompson: I apologize, Your Honor. Go ahead.

The Witness: If they had been attached—if they had not been attached they would have all fallen apart, evidently then it is perfectly normal that they were attached.

Mr. Thompson: I ask that that go out because that is a conclusion.

These are two separate files. Will you hold these together, as long as you hold them they don't fall apart, do they?

The Witness: No, they are attached.

By Mr. Thompson:

Q. Are those two attached? A. Yes.

Mr. Thompson: Let me have two separate sheets of paper—never mind, Your Honor, I will withdraw it.

77 The Court: Anything further, gentlemen?

Mr. Thompson: I have nothing further from this witness, Your Honor.

Mr. Branson: I offer this, Your Honor, as proof of the probate of the will of Marion E. Sabbs, and ask that it be marked Exhibit 1 of the caveatees.

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(Thereupon, counsel approached the bench and conferred with the Court, out of the hearing of the jury, as follows:)

• • • • •

80 Let us look at those requirements. First the will must be signed by the testator. We will assume, we will concede for the purpose of this argument that both witnesses did in fact testify that the will was signed one by inference and one directly. Dr. Robinson testified from that stand that he saw Mrs. Sabbs sign this will although it was not clear how far he was from the bed at the time, or whether or not he recognized the paper of which she was then signing and whether or not he in fact knew that to be her will.

The other witness, Mrs. Lurton, testified she didn't see the testatrix sign, but that the testatrix acknowledged that to be her will. I assume that will satisfy the requirements under the D. C. law in reference to the point and we do not strongly urge it, but merely point it out to you.

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84 The Court: The evidence before the Court at this time is first, she signed the paper; second, that she
85 requested one of the witnesses to sign the paper; third, that the other witnesses saw her sign the paper. Now when all this is done and all that has been established,

then the burden of proof, so far as burden of proof is concerned, is shifted from the proponents of the will to the contestants for them to show her lack of mental capacity, fraud or undue influence and I have tried hundreds of will cases in my time in 38 years I have practiced and I know I am right.

I will hear you if you want to be heard, but you are wasting time.

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Mr. Washington: I take an exception, Your Honor.

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296 Thereupon—

ELIZABETH LURTON

was called as a witness by the defendants and, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Branson:

Q. State your full name, please. A. Elizabeth H. Lurton, 1111 Columbia Road, Northwest, Apartment 28.

Q. You have already testified that you were the head nurse on Ward 10? A. Yes.

Q. Now directing your attention to May 7, you saw Marion E. Sabbs at Freedman's Hospital? A. Yes.

Q. And you remember when you affixed your signature to the will? A. Yes.

Q. Now at that time how long had Marion been under your observation? A. From the time she arrived in the hospital, which was 1:20.

Q. Had you had anything to say to her while she was there? A. Oh, yes, as I do with all patients, we come
297 in and talk to them and ask them how they feel.

Q. Was she able to make any response to your inquiries? A. Yes, she was.

Q. And from your observation of her she understood what was going on? A. Definitely.

Q. Approximately in your career how many patients have you had occasion to observe? A. They are so tremendous that I could not tell you how many.

Q. Would you say over a thousand? A. Or more.

Q. From your observation of her and her reaction to your questions and what she said, can you tell in your own opinion whether or not she was at that time and at the time of the execution and signing of the will of sound mind?

Mr. Washington: I object to that.

The Court: An attesting witness is a different one from any other witness, an attesting witness can always give their opinion as to whether or not the person who is alleged to have made the will was of sound mind, that is the general rule.

Mr. Washington: Very well.

The Witness: May I hear your question again?

(The question was read by the reporter.)

298 A. Yes.

Q. At that time—at the time the will was executed was oxygen being administered to her? A. It was not.

The Court: About what time was it, what time of the day was it that you signed your name?

The Witness: After refreshing my recollection I would say it was 2:20 rather than 3:00 o'clock.

• • • • •

By Mr. Branson:

Q. Was Dr. Swan present at the time of the execution of the will? A. No.

Q. Was clyses administered before or after the will was executed? A. After the will was executed

Q. Now I am going to show you the official record—

The Court: Is that record already in evidence?

Mr. Branson: Yes, sir.

The Court: All right.

By Mr. Branson:

Q. I want to ask you this question, does the doctor who treats the patient originally when he comes to the hospital, such as an interne in charge sign the record with respect to treatment which is administered to the patient? A. Yes, he does.

Q. Does the doctor also sign a slip for the drugs to be administered? A. Definitely.

Q. I am going to give this report and ask you to see if any place in that record you see any treatment, the administration of drugs or anything by Dr. Swan, the third assistant at Freedmen's Hospital, being administered to the patient on May 7? A. I don't.

Q. What doctor appears there as the doctor who actually administered the treatment? A. Dr. Forcia was
300 the interne on the ward, his name would appear on the sheet for everything ordered for that particular patient.

Q. Does the record indicate that from 1 to 2:30 any particular drug was being administered—any drug of any type was being administered to Marion E. Sabbs? A. No, it does not.

Q. Does it indicate any type of medication having been given to her? A. No, it does not.

Q. Before the execution of the will will you explain what the doctors were actually doing? A. There is a physical examination that is made of the patient who comes in the hospital which includes blood pressure, an examination of the patient's body and the findings recorded.

Q. And was that done in this case? A. I know the blood pressure was taken.

Q. And what else was done? A. Do you mean before the execution of the will?

Q. Yes. A. The blood pressure was taken, that is all I know that was done.

Q. Now with respect to the blood pressure, when you look at the record—I want you to look at the record
301 and see what that indicates there. A 150 over 100.

Q. Was that on May 7? A. Yes, it was. This information—

Q. Just a minute, I want you to read that next and see what it says.

Mr. Washington: May it please the Court, at this time I object to that. I think if she is going to read the record—the record has been introduced into evidence—she should read the entire record and not attempt to pick out a little phrasing of sentences which Mr. Branson thinks will be beneficial to Mr. Branson.

The Court: Now apparently the record was admitted without objection and the statement has been made that there was no blood pressure at the time, at the time the will was executed. Now I don't know what the record shows, or what time the blood pressure was taken.

Mr. Washington: Yes, sir.

The Court: As I understand the testimony is this embolism took place just like that, and if that is the case the heart stops but before that time she might have had blood pressure—I presume she did, I don't know whether the record shows what time—

The Witness: There is no hour on here.

The Court: Up to this time there is no evidence she
302 had embolism at the time she entered the hospital.

I understand you to say that there is nothing to show what time the blood pressure was taken?

The Witness: Not on this chart, according to the history and findings.

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309 Thereupon

ROBERT STEWART JASON

was called as a witness by and on behalf of the caveators and, having been first duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Washington:

Q. What is your full name? A. Robert Stewart Jason.

Q. Where do you live, Doctor? A. Howard University.

Q. What is the nature of your work there at Howard University? A. I occupy three positions: I am head of the pathology department; I am vice dean of the college of medicine; and I am pathologist at Freedmen's Hospital.

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310 By Mr. Washington:

Q. Doctor, I show you this paper marked as exhibit No. 2 for identification and ask you: do you recognize it, sir. A. Yes, sir; I do.

Q. What is it, Doctor? A. It is the only record of the autopsy performed on the body of Marion Sabbs. The autopsy was performed in Freedmen's Hospital—

The Court: What was the date, Doctor?

The Witness: The date of the autopsy record is 5/8/50 at 10 a.m. These records are kept in the department of pathology in the college of medicine and are therefore a part of the records in the files of my department.

By Mr. Washington:

Q. And they are regularly kept A. In my department.

311 Q. And under your supervision? A. Under my supervision.

Q. And you—

Mr. Washington: I wish to offer at this time the autopsy report of Freedmen's Hospital in evidence, the autopsy of Marion E. Sabbs.

Mr. Branson: When was this statement prepared?

The Witness: That report—Reports of autopsies are prepared on two different occasions or even three or four occasions. The main body of the report on that form is completed at the time of the autopsy in the autopsy room; when the examination is completed, there is a part there which is—a clinical history, or a survey of the clinical history; that is a chart of the hospital. The examination is made at the time of the autopsy or subsequent to the autopsy, but never before the autopsy.

I don't wish the impression to be passed around that what is contained in that document, the last sheet, is a description of the brain; when the brain is removed, it is not examined immediately, for the reason that the brain is relatively soft tissue and it is frequently necessary to do what we call "fix" it, that is, let it coagulate. Therefore, the examination of the brain will take place anywhere from a week to ten days or even several months after the autopsy is completed. So, that record was completed at different times.

312 Mr. Branson: When was your last record completed?

The Witness: That I don't know.

Mr. Branson: You had no participation in completing that?

The Witness: No. That is inaccurate, because, as I say, this is the final impression, and has to be approved by me; therefore, it is a record that has to come to me for survey and approval. That is something as to which I do not keep a record, as to the date, because there are several steps there, and I don't keep a record on what particular date the autopsy report was completed.

Mr. Branson: It was not completed as close as yesterday; was it?

The Witness: It was not.

Mr. Branson: Would you say it was completed some weeks or months ago?

The Witness: I cannot give you a better date than that. It was completed by Dr. King. Dr. King left the hospital, the department of pathology, at the end of June 1950.

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320 Q. Doctor, just one question, and then I will let you go on with the report:

Hardening of the arteries would affect the brain; wouldn't it? A. Yes; it would.

Q. It would impair the normal functions? A. Yes; but I would like to modify that to this extent: It depends on the degree of the hardening of the arteries and, in a sense, the degree of obstruction. This patient has things of that very nature, to have complete lack of sufficiency in one part of the brain. That was the reason for the finding which vitiated that area of the brain which had softened, and that part of the brain which controls the fibers, the motor cortex of the brain, to supply the fibers which control the muscles at one level. Therefore, the patient must have been paralyzed before death, on the left side, so that there was hardening of the arteries to a sufficient degree to cause
321 impairment of the brain, but that does not mean that the brain was impaired in all functions

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Q. Doctor, did it affect the sensory organs located in the brain? Suppose that is the brain (indicating): this is the sensory part and this is the area which is the motor part. A. The motor part. In other words, the fibers coming from that brain, it would indicate that this patient must have been paralyzed on the left side. As to the extent of the paralysis, I cannot state. She must have been paralyzed

on the left side.

Q. Did it affect any of the emotional centers of the brain itself or control the emotions in any manner? A. The softening extended backward and downward, but only the upper most interior part of the thalamus was involved; so, she might or might not have had emotional disturbances. It is possible that a person could have that much and not be emotionally disturbed.

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322 Mr. Branson: I think we are proceeding somewhat irregularly with respect to an expert. He said he was going to introduce expert testimony, and he did introduce the record. The record is complete and it needs no further identification.

Now, if counsel wants to refer to the record, in order to frame a hypothetical question, I have no objection, but certainly I do object to this long lecture on medicine, which has no necessity in this case.

• • • • •

327 Q. I put to you this question, Doctor:

Let us assume that X, Doctor, suppose X through thirteen years prior to May 7, 1950 had suffered a stroke and was paralyzed on one side of her body and that impaired her brain, and suppose she had high blood pressure, and suppose she had a tumor, and suppose she had pulmonary embolism: would you say that a person in that condition, one hour before her death, knew what she was doing? A. I would have to say unlikely, but there is a possibility that she might have known what she was doing.

The Court: Doctor, you have in your hand a complete autopsy report.

328 The Witness: I do.

The Court: Now, from that autopsy report are you or are you not able to express an opinion as to whether

or not, on the afternoon of May 7, 1950, deceased was able to execute any important document, such a deed, contract, or will, with knowledge and understanding?

The Witness: I doubt that very seriously, your Honor.

The Court: What is your opinion?

The Witness: It is my opinion that I do not think she could.

The Court: What was that?

The Witness: I do not think she could.

The Court: All right.

By Mr. Washington:

Q. Now, Doctor—

The Witness: May I qualify that, your Honor?

The Court: Talk to the jury, please.

The Witness: I have stated categorically I do not believe she could, and that is my conviction, but I want to make clear that the most important evidence in a case like this would have to come from the people who saw her at that time; but it is most unlikely that she could do anything.

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330 Q. Now, Doctor, with that same picture, can you conceive of a patient being able, if a pen was placed in her hand, being able to scratch her name? A. That depends upon what scratching her name means. If she had enough strength to hold the pen in her hand, it is possible she might be able to go through the motions.

Q. Could she respond to a suggestion by someone else to write her name? A. She could make the effort; whether she could go through with it is another question. She could make the effort.

Q. Even though she didn't have the mental capacity? A. Mental capacity—She could make the effort if she had enough strength to do so, but that is something the clinician would have to evaluate.

Q. That would apply equally to motor capacity? A. That is right.

Q. She could write her name and understand what she was doing? A. I say, she might be able to; I didn't say she could. I say, the particular person who saw the patient at that time would have to answer the question. I would feel most likely she could not, one hour before death. If you carried it back four or five hours before death, that is another matter.

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331

CROSS EXAMINATION

By Mr. Branson:

Q. You are testifying as an expert in this case, are you, Doctor? A. Yes; I am.

Q. You are receiving compensation for your testimony? A. So far, I have been told nothing about compensation; I have asked no question about compensation. I came in because a brother faculty member asked me if I would give him some advice on a case and tell him what I knew about the case. So far as my presence here is concerned, he asked me to come down to testify, and I said, "Yes." I indicated nothing about a charge and I don't intend to charge.

Q. You came to defend Mr. Quick, who is appearing here as an attorney? A. I am not defending any one. I came at the request of Mr. Quick.

Q. Now, your testimony is—I thought you said on direct examination that her condition was such that possibly she could not execute a will or attend to any important matters.

The Court: He didn't say that.

By Mr. Branson:

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Q. Did you say that at one time on your direct examination? A. I answered the direct question that I did not think she could one hour before death.

Q. You did not believe she could? A. Yes.

Q. Now, that was coupled also with the fact that she had high blood pressure—that was one of the factors which intervened, for you to reach that conclusion? A. That is true.

Q. How old was she, according to the pathological report? A. According to the report, there are two ages given; now, which one is correct I cannot state. The front page has the age 44 and in the body of the report, under the heading, "Physical Examination", is the statement "well-developed and nourished obese female 53 years old"; so that which one of these two ages is correct I don't know.

Q. The report does not show where the information came from? A. No, not so far as the front page is concerned. The second one is the clinical history.

Q. A person of any age, would you say, with a blood pressure of 150 over 100, has high blood pressure? A. Without question.

333 Q. It is? A. Unquestionably; yes. May I qualify that?

Q. A person 53 years old—

The Court: Wait a minute.

The Witness: You have to remember that the significant pressure is not the 150 but the 100; and 100 is very definitely high blood pressure in anybody.

By Mr. Washington:

Q. You don't care what the age is? A. I don't care what the age is; yes.

Q. Now, assuming that same person was able to recognize her friends, and she also was able to acknowledge to a nurse that the paper which she signed was her will—

The Court: That is not the testimony.

Mr. Branson: That is the testimony in the record.

The Court: Just a minute. The only testimony is that

of the witness Mrs. Lurton, who stated that the deceased asked her to witness her will.

Mr. Branson: May we approach the bench? I think, your Honor,—

The Court: No; it is not necessary. Say what you have got to say there; there is no necessity to come up here.

Mr. Branson: Will your Honor indulge me just a moment, please?

The Court: Certainly.

334 By Mr. Branson:

Q. Assuming that she asked her to sign her will or asked her to sign a paper, would that in any wise change your exisaining belief? A. As I tried to indicate a while ago, I have been in shock, and I could talk, I could make a statement, but I was not able to perform any significant mental function, but I could speak. And on the same basis, that would obtain here; that person could talk.

Q. Could you identify objects and things? A. Yes, sir; I had to identify my wife when I was in shock.

Q. If you had written in longhand—

The Court: That paper is not in eveidence yet.

Mr. Branson: I know it is not.

By Mr. Branson:

Q. —a paper writing in your own handwriting, you would have been able to identify it? A. May I complete my answer?

Q. Yes. A. When this document was given to me, in order to identify it I didn't just glance at the first page, I went through several pages to see if this was the whole document concerned. I doubt if the patient could do that, if somebody held it in front of her. She could open her eyes
335 and glance at it. Even her vision could be impaired, to the point where she could not see well; she could recognize the outlines of the paper, the handwriting, and

say, "Yes; that looks like what I have been before"; but as to the matter of going into the document and completely examining it, I doubt it most seriously that she could.

Q. If a paper were handed her and she opened her eyes for a moment, she could pretty well look at it and identify it? A. She could recognize the topographical outlines of the paper and the outlines of the handwriting, and, if somebody went over it, page by page, she could recognize that as something she had seen before, if her memory was sufficiently clear. She might be able to recognize it completely; that would depend on how her mental attitude would be at the time.

Q. It varies in different people? A. Varies from time to time in the same people. In other words, a person might look at it and be partially lucid and become unconscious—

Q. It is possible to have lucid intervals and intervals where you could not do anything? A. That is right.

Q. During those lucid intervals that they can have, they can talk; can't they, Doctor? A. It is a broad term, and anything small, simple in degree, yes; thinking complicated thoughts, no.

336 Q. Now, complicated, you said, No. Do you think they would know who their relatives were? A. Yes, the matter of identification of individuals.

Q. They would know who their relatives were; wouldn't they? A. I said, "Yes."

Q. And, if probed about what property, they would know about pretty well what they owned? A. To tell you frankly, in my own past, I sometimes forget particular points. If she had to transfer property, she could not remember all of her property, but she might be able to remember the basic facts, but not the details.

Q. If she was going to give that away, she would know to whom she was giving it? A. Most likely she would know what she intended to do; yes.

Q. Other than the fact of knowing what relatives you had, what property you owned, and what disposition you

wanted to make of it, in your opinion what else is necessary to mental capacity to make a will?

Mr. Washington: I object, your Honor.

Mr. Branson: He has related his opinion why she had no—

The Court: You have to state all the qualifications.

Mr. Branson: He has related the factors that she
337 would be able to know who her relatives were and what property she owned and what disposition she was making of it, if she was actually giving the property away.

The Court: The question is whether or not she would have sufficient judgment and understanding to know who were, in her opinion, the proper objects of her bounty, and discriminate as to what her judgment should be in connection with them.

That is the question.

The Witness: I have already given my answer to that.

The Court: Give it again.

The Witness: If the patient had made up her mind beforehand—

Mr. Branson: No; that was not my question.

The Court: Just one minute. Let him answer.

The Witness: —what she wanted to do, my guess would be, my guess would be, my conviction would be, that she would still have some knowledge as to what she wanted to do; but what I want to make clear is that to have knowledge of what she wants to do and to be able to recognize a particular document are two different things. I don't think we should combine the two at once.

The Court: Proceed, sir.

By Mr. Branson:

Q. Now, this stroke that she had—Now, also, this
338 condition of arteriosclerosis is common to anybody over the age of forty years; isn't it? A. I have seen it begin lower than that; yes.

Q. And the only pronounced thing was that it sometimes affects the; is that right? A. That is an incorrect statement. It completely paralyzes a portion of the brain; so, I would not say "it sometimes affects the brain."

Q. Did that affect her motor activity? A. Very much.

Q. Many people who are paralyzed can think clearly and act clearly? A. Unquestionably; yes.

Q. Paralysis does not affect that part of the brain? A. Not the part of thinking, because that is in the front of the brain.

Q. As far as the question of what she was able to do, your opinion will be controlled by what one actually saw her do at the time, at the bedside; would it not? A. I gave you an opinion as to what I thought she could do. You will have to get that opinion from the one who saw her.

Q. That is purely conjectural, upon what there is before you and nothing else? A. I would say more than a
339 conjecture; very good reasoning process on the basis of the evidence that you have.

Q. If factually different from what you had before you, you would be inclined to change your opinion, also; wouldn't you? A. It depends upon what you mean by "factual evidence". I would like to have a knowledge as to what you mean by "facts".

Q. If people— A. May I complete my statement?

The Court: Let him answer the question.

The Witness: Because I happen to know, in connection with a discussion of medical opinion, that opinion is not fact; statements of opinion is not fact, or even the statement itself is not intrinsic fact. I would have to know the character of the individuals giving the statements before I would accept it.

By Mr. Branson:

Q. You would also have to know their interest in the proceeding? A. I certainly would; yes.

Q. If they were interested in the outcome of the proceeding, and would take something as the result of it, you would weigh that also? A. I would have serious doubts one way or the other; yes.

* * * * *

217 Thereupon—

JAMES SWAN

219 The Court: All right.

By Mr. Quick:

Q. What happened that caused you to contact her on the ward? A. The interne called me to see the patient.

Q. When the interne called you you went where she was? A. That is right.

Q. Where was she and what was her condition at that time, Doctor? A. Well, she was in acute respiratory distress, that is what occasioned the interne to call me.

Q. Will you explain so that we can understand exactly what you mean by acute respiratory distress? A. She was breathing rapidly and apparently short of breath.

Q. How did she look? A. Well, she looked critically ill.

Q. Was she flushed? A. No, she was cyanotic, a sort of bluish color.

Q. Was she apprehensive, Doctor, how did she appear emotionally; did she appear in pain? A. As I recall she didn't appear to be in any pain at that time.

220 Q. And when you came to Miss Sabbs what, if anything, did you do? A. Well, as I recall the first thing that I did was to call Dr. Lloyd who was my immediate chief and notify Dr. Robinson and we probably got—we got some oxygen for her and administered some oxygen and we attempted to get into the veins and get some blood from her and start some fluid intravenous.

Q. Now, Doctor, prior to trying to get into her veins, did you make a physical examination of the patient? A. We

took the blood pressure—or attempted to take the blood pressure record, and we checked her pulse and I believe we listened to her heart and her lungs and examined her superficially; it was not a complete examination at that time.

Q. Did you attempt to get a history from her, Doctor? A. We attempted to get some history from her, yes.

Q. Did you succeed, Doctor? A. Yes, we got some history from her.

Q. What, if anything, did you do after getting her history? A. Well, it takes some time attempting to get into her veins, and so forth, and at that time Dr. Robinson had arrived on the ward and we were all attempting to start some fluid and Dr. Keller came and they took an ekg
221 tracing and I think we sent for a cutdown set, trying to cut down under her veins, to get into her veins.

Q. In other words, you cut into her veins, did you cut the right arm or her left arm? A. It was her right arm that we cut, yes, I recall definitely cutting on her right arm. I think possibly we may have cut on her left arm also, but I would not be sure.

Q. How long after Dr. Robinson came did Dr. Keller arrive? A. That I could not say at this time.

Q. Now, were you there in attendance all during that time up until her death, doctor? A. Yes, sir, I was there on the ward; I may have left the ward to go down to the central dressing room, I don't remember.

Q. What time did the patient die, Doctor? A. I cannot state what time it was.

Q. Now, Doctor, was that patient in shock? A. The first time that I saw—

Mr. Branson: I object to that. Let him ask the doctor what was the condition of the patient; I think that is proper.

The Court: He has already put a general question. He has a right to proceed. Your objection is overruled.

By Mr. Quick:

222 Q. You state she was in shock, Doctor? A. She didn't have any blood pressure, we were not able to get her blood pressure when we first tried to take it.

Q. What do you mean by a patient being in shock, Doctor?

Mr. Branson: I would like the doctor to specify the time when she was in shock.

The Court: The Doctor has not said she was in shock yet. He said she had no blood pressure, whether that means she was in shock or not, I don't know.

By Mr. Quick:

Q. Will you answer as to whether or not she was in shock, Doctor? A. I am not able to state just what shock is, but not being able to get her blood pressure, not having blood pressure is one of the findings in shock. I would have considered the patient to be in shock when she did not have any blood pressure.

Q. Now, what is the result of being in shock generally, what effect does it have on a patient, Doctor? A. I don't think I could answer that question.

Q. Does being in shock mean that there is an insufficient supply of blood flowing through the body? A. It must be that; there are different kinds or types of shock.

223 Q. Now you have stated that the patient had a cyano condition. A. That is right.

Q. You first observed her on coming to the ward? A. That is right.

Q. What do you mean by a cyanotic condition, Doctor? A. Cyanotic condition is due to a reduced amount of hemoglobin in the blood stream which is due to an insufficient amount of oxygen.

Q. By that you mean that the blood contains impurities, Doctor? A. It does not contain enough oxygen for the amount of hemoglobin which is present.

Q. Now, Doctor, isn't it true that when a patient is in shock there is a marked depression in all bodily functions?

A. I cannot answer that.

Q. Now, Doctor, after you started to give oxygen, what, if anything, happened then? A. I don't understand your question.

Q. Was there a time when anyone was at the bedside of the patient other than Dr. Keller and Dr. — what is the name of the other doctor?

The Court: Robinson.

224 A. Robinson.

By Mr. Quick:

Q. Or Dr. Robinson and Dr. Lloyd or Dr. Forcia was present? A. Dr. Robinson, Dr. Lloyd and Dr. Forcia were also present.

Q. And when did you or did you not see a Mr. Henderson? A. I don't know him.

Q. Mr. Henderson, stand up, please.

(Mr. Henderson stands up.)

Q. Do you recognize this gentleman, do you remember seeing him at the bedside? A. I could not say that I do.

Q. You could not say. Did you at any time see the nurse Betty Lurton at the bedside? A. Yes, sir.

Q. Did you at any time see Betty Lurton sign a paper? A. No, I didn't.

Q. And you were in the room at all times, Doctor? A. No, I was not in the room at all times, she was not in the room; she was on the ward.

Q. Were you in the ward at all times? A. No, I was not.

Q. Were you ever out of the ward for an appreciable
225 length of time? A. I was not off the ward for any long length of time.

Q. How long were you—what was the longest period in which you were away from the bedside of the patient? A. I could not say that because I was in and out of the dressing

room and I may have been at the telephone or something like that, I don't remember.

Q. Is it true, Doctor, that it was impossible for you to get all the history from the patient? A. Well, I didn't attempt to get a full history from the patient, I was busy trying to start a fluid and get into her veins, because that was the main thing I did while I was there on the ward.

Q. Now what fluid did you inject into her veins, Doctor? A. Well, we attempted to start some glucose into her veins, we were unable to get in with just the ordinary needle that we are usually able to do, and we had to get a cutdown set, that is, we had to make some incisions in the arm to cut down on the vein in order to get it in.

Q. Approximately what time, Doctor, did you attempt to start this injections? A. After I had conducted the various trials that I told you about—that was the main thing that I was doing during the time I was there, trying to get into her veins; it took quite a while.

226 Q. Quite a while, would you say 15 minutes to half an hour? A. About half an hour, I would say.

Q. Took you about half an hour before you were able to get into her veins, is that right, Doctor? A. I was trying to get into her veins for about half an hour with the various things—

Q. You were? A. That is right. I was never able to get into her veins.

The Court: He said he never got it into her arms.

By Mr. Quick:

Q. After you had cut into her arm so as to start the solution into it, how long did it take for the solution, how long was she continuing to get that injection into her arms?

Mr. Branson: I object.

The Court: He said he never got into her arms.

The Witness: It was finally gotten in, I think Dr. Robinson was able to get it in after we cut down on the arm.

By Mr. Quick:

Q. I see. How far down did you cut the arm, Doctor?
A. Down to a vein.

Q. How deep did you cut? A. It was not too deep an incision.

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230

CROSS EXAMINATION

By Mr. Branson:

Q. You are the third assistant at Ward 10, is that
231 correct? A. That is right.

Q. Who was the first assistant there? A. Dr. Lloyd at that time. I was chief resident.

Q. Now, isn't it a rule at the hospital that the doctor who administers the treatment to the patient should sign the report? A. Not necessarily.

Q. You didn't sign the report, did you? A. No, sir.

Q. What was that? A. No, sir.

Q. Isn't it actually a fact that Dr. Forcia, the interne, is the one who was actually treating her? A. Dr. Forcia wrote all the orders for her and I gave some verbal orders to the nurses and to Dr. Forcia.

Q. Did you see a Dr. LeCompe there at any time? A. Dr. LeCompte?

Q. Yes. A. I don't believe I know him.

Q. You said you didn't know him? A. I don't think so.

Q. How many people were around there at the time? A. Which time.

Q. At the time you say she was suffering from shock. A. When I first saw her she had no blood pressure,
232 there was no one there at that time but Dr. Forcia, the nurse and myself.

Q. You have also testified yesterday that you had a catheter in her nose for the purpose of administering oxygen, did you testify to that?

The Court: No, this Doctor didn't testify to that.

Mr. Branson: He didn't?

The Court: No, the first physician who went on the stand the first day of the trial testified to that.

By Mr. Branson:

Q. Did you testify you gave her intervaneous injections?

A. Yes, sir, I did.

Q. Now that was just to raise the volume of blood pressure so you could get the blood pressure, is that correct? A. We gave it as a means of attempting to save her life at that time. The point behind it would probably be to bring the blood pressure and blood volume up, yes.

The Court: Just a moment, I would like to ask the doctor a question.

The Witness: Yes, sir.

The Court: The Court understood you to say that she was suffering, one of the things she was suffering from at least was a want of oxygen in her blood. Now you
233 testified that what you were endeavoring to do and what one of the other doctors did or finally succeeded in doing was to introduce into her veins a what?

The Witness: A needle.

The Court: What medicine did you administer?

The Witness: We gave her blood and saline solution intravenously.

The Court: I understood you to say glucose.

The Witness: That is what I thought it was. I see by the record it was saline.

The Court: Does that tend to increase the oxygen in the blood?

The Witness: No, it does not.

The Court: All right, proceed, sir.

By Mr. Branson:

Q. Were you present when she gave the history in the case? A. I was present when she gave some history, yes.

Q. And notwithstanding the fact that she was suffering from shock she was conscious of what she was doing? A. She was able to give some history.

Q. And people who suffer with her condition, from a shock condition, was it actually shock? A. She had no blood pressure, she was in shock; she was—

234 The Court: Wait just a minute, what did you say?

The Witness: There are a lot of things that enter into shock, that is why I didn't say yesterday that the patient—I mean unqualifiedly say that the patient was in shock.

By Mr. Branson:

Q. And although a person is in a severe state of shock they might be aware of what is going on, know people and even under urging they may give you a history of their case? A. It is possible.

Q. And that state or condition can exist even if you were to raise her hand and it would drop as if she had no control over their motor reactions whatsoever, that is true too, isn't it? A. That is possible.

Q. Now, was it your job—was it a fact that on that date you were not supposed to be on duty? A. I was supposed to be on duty?

Q. You were supposed to be on duty? A. That is right.

Q. As a matter of fact, you were there on duty all the time? A. That is right.

Q. Did you see Mr. Henderson there? A. I cannot say that I did, I don't recognize him.

235 Q. Was Miss Tyree there? A. Miss Tyree was there.

Q. And she wrote the history of this case so far as the record is concerned? A. She wrote the nurse's notes.

Q. Now, this lady died of what condition, sir?

The Court: What is that question?

By Mr. Branson:

Q. What did she die from? A. According to the autopsy she died from pulmonary embolism.

Q. And pulmonary embolism is what, Doctor? A. A blood clot which comes from some place in the body and lodges in one of the pulmonary vessels, one of the lungs.

Q. In this case, from your record, what was the source, the origin of this particular blockage? A. It was from her left leg, I believe the autopsy showed—

The Court: What is that?

The Witness: That a vein in her left leg had been occluded by a large fibroid tumor which she had.

The Court: And that caused what in her lungs?

The Witness: It started in the leg, dislodged from a vein in the leg, and stopped in one of the vessels of
236 her lungs.

By Mr. Branson:

Q. Did you see a catheter in her nose, or was she being administered oxygen at the time you treated her? A. As well as I can remember I was present when the oxygen was started, I cannot say the exact time or when it was.

Q. And the oxygen was started. Do you know what time Mr. Henderson or any of the other people were there?

Mr. Thompson: I object to that.

The Court: On what grounds?

Mr. Thompson: He said he didn't see Mr. Henderson at all. Now with reference to the other people I don't know what other people he is talking about.

Mr. Branson: I will withdraw the question.

The Court: The question is all right. This is cross-examination. You can ask him the question if you wish.

By Mr. Branson:

Q. Yes. Were other people around there, was Miss Tyree there, Mr. Henderson there, how many people did you see within the enclosure while you were treating her?

The Court: Just a minute. The enclosure may be a tent. She was not under any oxygen tent, was she?

The Witness: No.

237 The Court: The enclosure was simply an enclosure around the bed?

The Witness: There were some curtains around the bed.

The Court: To make it more private?

Mr. Washington: I would like him to fix the particular time he is speaking about, because he is speaking about a period of three hours in which this doctor was in and out of that curtain.

The Court: All right.

By Mr. Branson:

Q. Were you within the curtain when Mr. Henderson and Dr. Robinson were there talking to Miss Sabbs? A. No.

Q. You were not there?

(Witness shakes his head).

The Court: You must answer, speak up so that the reporter and everybody can hear you, Doctor.

By Mr. Branson:

Q. Do you know whether you arrived before that time or after they were there? A. I arrived before Dr. Robinson arrived.

Q. And with respect to Mr. Henderson you don't know when he came in? A. I don't know.

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239 By Mr. Branson:

Q. That embolism might have started at any time?

A. It might have occurred at any time, I don't know when the embolism occurred.

Q. It is a sudden thing, can happen momentarily? A. That is right.

Q. You can be well today, and if a pulmonary embolism occurs you are dead the next minute? A. That is right.

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414

MAIZINE TYREE,

a witness called by the caveattes, after being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Shief:

Q. Please give us your full name. A. Maizine D. Tyree.

Q. What is your occupation? A. I am a registered nurse.

Q. Where? A. Freedmen's Hospital.

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Q. On May 7, 1950, were you on duty at Freedmens Hospital? A. I was.

Q. What was your particular assignment or what ward or what were your duties that particular day? A. I was assigned to Ward 10. That was my ward to work.

Q. What were your particular duties under that assignment? A. I took care of admission. That was on a Sunday. I took care of admissions and preparing patients for the operations for Monday and treatments and medications.

Q. At that particular time, did you receive or did you admit or did you take steps to admit one Marion E. Sabbs; do you remember that? A. I did.

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Q. Did you receive Miss Marion Sabbs on that day? A. I did.

Q. When you received her, what was your duty? A. To admit her to the ward, make out her chart, and take the

admission notes and put her to bed, prepare her for the doctors that would come on the ward to examine her.

416 Q. You prepared her chart? A. Yes, sir; I did.

Q. You also prepared her admission card, did you say? A. The admission note.

Q. The admission note? A. Yes, I did.

Q. In preparing your admission note, do you remember what time that was? A. Yes, I do.

Q. Will you state what time? A. It was 1:20.

Q. 1:20 when she was admitted to the hospital? A. To Ward 10.

Q. Was she then placed in bed? A. Yes, she was.

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418 Q. When you put her to bed, you said you and the ambulance man were there, and you pulled the curtains to prepare her for the doctors. You mean by that there are certain preparations necessary before you call a physician? A. Yes.

Q. And while all that was going on, was she composed? A. Yes, she was composed.

Q. Did she seem to be in misery, agony, or pain or anything? A. She wasn't painful. That was one of the questions we have to ask them when they come to the ward. It is a routine question. She wasn't painful and I did put it on the chart after I asked her. It was one of the things I wrote down on the chart. She wasn't painful.

Q. Was she perfectly normal and perfectly capable of carrying on conversations? A. Yes, she was capable of carrying on a conversation.

Q. Did she give you a history of her case? A. She answered all questions that I asked her. I do not take a history of the case.

Q. While you prepared her for the physicians, how long would you say it took before the physicians came? How long

does it usually take you to prepare anybody for the physicians?

419 Mr. Thompson: This particular person.

The Witness: It was a doctor that was assigned to the ward.

Mr. Thompson: Give us the time in this particular case.

The Witness: The interne was notified when she arrived at the ward.

By Mr. Shief:

Q. And he was notified how soon thereafter? Did any other physician come?

Mr. Thompson: The answer is pending.

Mr. Shief: I beg your pardon?

Mr. Thompson: The answer is pending to the question: how long was it before a physician came?

The Witness: Came to her bedside?

Mr. Thompson: Yes.

Mr. Shief: Approximately. You can't tell exactly.

The Witness: It was within the next half hour.

By Mr. Shief:

Q. Within the next half hour? A. Because he was on the service.

Mr. Thompson: But he came within one-half hour?

The Witness: He was already there. He was already on the ward. I just had to tell him that "We have a new patient," that is all that I have to tell him.

420 By Mr. Shief:

Q. And that "she is ready for you," do you have to tell him that? A. No.

Q. Just tell him you have a new patient? A. That I have a new patient.

Q. I see. Who was the physician in charge of the case? A. Dr. Alvin Robinson.

Q. Were any other people present when Dr. Alvin Robinson came? I mean when did Dr. Alvin Robinson come? A. Dr. Robinson was in the hospital at the time of the admission and he came to the ward—it was approximately half an hour after she was there.

Q. He came in about half an hour? A. Yes.

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421 By Mr. Shief:

Q. After she had been put to bed and the doctors came there, were you present or did you hear anybody discuss a will or did you see a will, a paper writing? I won't say a will. Did you see a paper? A. I saw a paper.

Q. And did you see her sign it? A. Yes, I saw her sign it.

Q. Do you know who signed it? A. Yes, I know who signed it.

422 Q. Who were they? A. Mrs. Lurton, my head nurse.

Q. Mrs. Lurton, your head nurse? A. Yes.

Q. And anybody else? A. Dr. Alvin Robinson.

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423 Q. Did you hear Miss Sabbs discuss this paper that she wanted witnessed? A. Yes.

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424 Mr. Shief: Just tell us what you heard Miss Sabbs say. A. She asked Miss Lurton to sign this will, this paper. I don't know what the paper was.

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Mr. Thompson: She asked Miss Lurton to sign; is that right?

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By Mr. Shief:

Q. Did you hear her ask Miss Lurton to sign this paper?

Mr. Thompson: Just a moment. I object. That question

has been specifically answered. She said she heard her ask Miss Lurton to sign the paper. Why go over it again?

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425 By Mr. Branson:

Q. Did you see a paper writing? A. Yes.

Q. Did you know what that paper writing was? A. Miss Sabbs said it was her will. I don't know.

Q. You heard Miss Sabbs say that? A. Yes.

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426 By Mr. Branson:

Q. Tell me, whom did she ask to sign that as witnesses to her will?

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A. Miss Lurton.

By Mr. Branson:

Q. Miss Lurton, and you were in Miss Lurton's presence and the deceased's presence at that time?

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427 A. I was at the patient's bedside.

By Mr. Branson:

Q. Did you see anyone sign that will? A. Yes.

Q. Who signed the will? A. Miss Lurton and Dr. Alvin Robinson.

Q. Before the will was signed, had you immediately prior to the signing of the will talked to Mrs. Sabbs? A. Oh, yes.

Q. Thereafter you testify you had a conversation with her? A. I admitted Miss Sabbs to the ward and put her to bed.

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(Continuing) I asked Miss Sabbs the routine questions. First, was she painful? She wasn't painful on admission. She was suffering only from shortness of breath. She asked me to adjust her in bed so she would be comfortable. She told me that she didn't think I could move her by myself,—but I was able to—because she told me that I didn't seem that I should be a graduate nurse, that I looked too young, and then I took her temperature, pulse, and respiration
428 and notified the doctor that she was there.

By Mr. Branson:

Q. From your conversation with her and your observation, what is your opinion as to her ability to make a valid deed or contract?

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A. Miss Sabbs appeared to be rational when she was admitted.

By Mr. Branson:

Q. In your opinion, was she of sound mind?

Mr. Thompson: I object to that.

A. She was of sound mind.

By Mr. Branson.

Q. And was she of sound mind at the time that you saw her sign the will? A. She was of sound mind.

Mr. Branson: That is all. Your witness.

CROSS EXAMINATION

By Mr. Thompson:

Q. You say when Miss Sabbs was admitted you asked her these questions at that time; is that right? A. Yes.

Q. How much time elapsed between the time that
429 Miss Sabbs was admitted and the time that this paper was allegedly signed? A. All of this took place within the next forty-five minutes.

Q. Within the next 45 minutes? A. That is right.

Q. When Mr. Shief asked you how much time elapsed before the doctors came, why did you tell us it was half an hour? A. You said the doctors came? He asked me how long was it before the doctors came. It was approximately half an hour.

Q. And how much time elapsed between the time the patient was admitted and she allegedly requested someone to sign this paper? A. It was within the next 45 minutes.

430 Q. Within the next 45 minutes? A. Yes.

436 Q. And she did ask you if you would sign; is that true? A. Yes.

Q. Further on direct-examination you told us that you saw Mrs. Sabbs take something out of her pocketbook; is that right? A. No, I didn't tell you that. I said I couldn't remember whether it was in her pocketbook or not.

Q. You couldn't remember whether it was there or not? A. That is right.

Q. So you don't know where she got this paper from? A. No.

Q. Was she lying down on the bed or sitting up? A. She was slightly elevated.

Q. She was slightly elevated? A. Yes.

Q. You are familiar with degrees of elevation, are you not? A. She was about 45 degrees.

Q. She was about 45 degrees? A. Yes.

Q. Which was was her head, north, south, east or west? Visualize the ward. A. Beds go this way (indicating). Her head was up here (indicating).

437 Q. Her head was facing west; is that right? A. Yes.

Q. That means that she was on the west side of the ward; is that true? A. Yes, she was on the righthand side of the ward.

441 Q. You set up the chart? A. Yes.

Q. Who did the writing on the chart, then? A. I did.

Q. As to her condition when she came in? A. I did.

Q. You did? A. Yes.

Q. How old are you? A. Twenty-five.

Q. Now, you say that Miss Sabbs said to you that you looked to be too young to be a graduate nurse; is that true? A. Yes.

Q. What else did she say to you? A. She told me that I was too tiny to be handling the heavy ladies.

• • • • •

442 Q. Did you see any type of instrument, medical instrument, from which persons pump oxygen or some other medicines up this lady's nose? A. There was none.

Q. You didn't see that? What other nurse was in attendance there at the time? A. I was the only one.

Q. You were the only one? A. That is right.

443 Q. And the only one in the entire ward? A. I was the only one.

Q. The only nurse on the ward? A. That is right.

Q. Miss Betty Lurton was there, wasn't she? A. She is the head nurse, yes.

Q. The head nurse. Just the two of you had the whole ward? A. That is right. She was the head nurse and I was working on the ward.

• • • • •

447 Q. Did you read the chart again before you came down here? A. Yes.

Q. That refreshed your memory; is that right? A. Yes, as far as my notes were concerned on the chart.

Q. Let's see those notes you have. A. I don't have any. I mean just my admission note on the chart, because I was the only nurse that had any note whatsoever on her chart.

Q. Did you write those notes right in the course of your admitting her? A. Yes, that has to be done.

Q. That is how you know she died at 4:20, is that right, by refreshing your memory on it? A. That is the time she was pronounced lifeless.

Q. What else did you see on that particular chart? A. That I wrote?

Q. Yes. A. I wrote on here that Miss Sabbs stated when she came in that she was a little afraid of her operation. Do you want to know anything else? There was so much. It consisted of all the treatments that we gave her.

Q. Tell us about the treatments. What treatments did you give her there? A. We set up fluids on her.

448 Q. When you said you set up fluids on her, you mean you stuck some needles in her arm, put a little something in her? A. Yes.

Q. You did that to her? A. Yes.

Q. Was that in her left or right arm? A. We set up fluids on both arms.

Q. On both arms? A. Yes.

Q. I am not a doctor. Did you have something stuck in her left and right arm; is that what you are telling us? A. Yes.

Q. Good enough. What time did you do that? A. This was approximately 3:30.

Q. And is that fluid termed "life fluid"?

Mr. Bronson: Saline solution.

A. It could have been saline; in fact, it was. She received 500 cc's of whole blood.

Q. And what other type of treatment did you give her? A. An electro-cardiogram was done on her.

Q. Who did that? A. Dr. Keller.

Q. What other treatment was given? A. She also received what you termed as "life" water.

Q. That is what I asked you when you said saline
448 solution. Is it one and the same? A. It is distilled water. It is a certain percentage of glucose and distilled water.

Q. The common name among laymen is "life water"?

A. But that is all wrong.

Q. What operation was she talking about, Mrs. Tyree?

A. I can't tell you the exact name of the operation but that is what she came to Ward 10 for. She had a large tumor.

Q. Where was the tumor located? A. In her abdomen.

Q. In her abdomen? A. Yes.

Q. Did she tell you she was afraid of the operation? A. She said that she felt a little afraid.

Q. Of the operation. What else did she say to you? A. She didn't say of the operation, she just said she felt a little afraid.

Q. Was it an emergency case? A. She came in as a regular Sunday admission.

Q. And did you consider it in your professional capacity as an emergency case? A. The operation Miss Sabbs came in for on the Sunday afternoon was one of our regular Sunday admissions.

Q. I will ask you again: in your professional capacity
450 did you consider that an emergency matter?

A. The tumor? No.

Q. You didn't consider it an emergency? A. No.

Q. You have said on several occasions that you were positive that the ambulance brought her in. Isn't it the usual procedure, if a person just came in—

Mr. Branson: I object to what is usual because that is too general.

Mr. Thompson: All right.

By Mr. Thompson:

Q. The ambulance did bring her in, you say, and the driver brought her up and helped you put her in bed; is that right? A. Yes, that is what they are supposed to do?

Q. And you did say and it is your statement now that that wasn't an emergency? A. Her operation, you said?

Q. No. When she came in there, did you consider it an emergency case? A. No.

Q. What type of cases do you consider emergency cases, then? A. I will tell you so you can understand. On Ward 10, an emergency case would be Caesarean section, 451 ectopic pregnancy—those are our most common emergencies on Ward 10.

Q. Dr. Kelley Brown treated her? A. I said Dr. Keller.

456 Q. Didn't you tell us you refreshed your memory
prior to coming down here, that is how you know
457 the exact time she died? A. I didn't go today.

Q. When did you go? A. I went to the admitting office the same afternoon that attorney Shief called me, got her hospital number and went to see the lady's chart.

Q. What afternoon was that when Mr. Shief came to see you? A. He called me on the ward at Freedmens Hospital.

Q. And you left your ward and went down and checked? A. I went to the main office and got her number.

Q. Did he ask you to go down and get her number? A. No.

Q. How did you happen to go voluntarily? A. I didn't remember exactly the lady's name, but in reading the chart I remembered the case very well because I worked with her from the time she came in until she was sent to the morgue.

Q. You didn't know anything of her until you went down to read the chart? A. The name didn't register. I have a lot of patients but after seeing who it was I remembered distinctly, because I worked with her.

459 Q. Didn't you tell us a few minutes ago that you were sure that only you and Betty Lurton, your immediate supervisor, were on duty that particular day? A. You asked me at that time.

Q. At that time? A. That was a 1:20. I was the
460 only one there at the time, I was the only one that
came in for Miss Sabbs.

Q. But other nurses were on the ward, is that right? A.
Oh, yes, we have 30 some patients.

Q. That is what I wanted. I asked you that. A. You said
at that time, Mr. Thompson. At that time, you said, when
she came on the ward.

Q. That is right, and there were other nurses on there be-
sides you? A. Not at that time. They were probably off
at lunch or something, but there were other nurses there,
oh, yes.

Q. So when they go to lunch they may have 30 patients
with one nurse and the head nurse for admission, treatment
of other patients, and all that sort of thing? A. Your lunch
hour is 30 minutes long. You wouldn't have it all the time,
but you are able to cover until they come back.

Q. Thirty patients? A. Definitely.

Q. Even a patient who was as ill as Miss Sabbs when she
came in? A. She wasn't critically ill when she came in.

Q. Was she severely ill? A. No, she wasn't.

• • • • •

463 Filed May 11, 1950. Theodore Cogswell, Register of
Wills, D. C. Clerk of Probate Court.

DEFENDANT'S EXHIBIT NO. 1

I, Marion E. Sabbs, of the city of Washington, in the
District of Columbia being above the age of twenty-one (21)
years and also being of sound and disposing mind, memory
and disposition do hereby make, ordain and declare this
my will and testament—that is to say:

A. I order and direct that my executrix, hereinafter
named shall pay all my just debts and funeral expenses as
soon as convenient after my death.

B. All insurances are made payable to undertaker for funeral expenses.

C. My Metropolitan Endowment policy I give to my god-child Ronald Dobbins to be used as a starter for his college education.

D. All money due to me from James Booras of Falls Church, Va., I give to Hattie B. Watson.

B. Property owned by me in Maryland, I give to Doctor Rembert C. Jones of Georgia.

F. Property owned by me in the state of New Jersey I give to Helen Alexander.

G. All property owned by me or that I have an interest in except that mentioned above in (E), and (F), I want sold and the money divided in three parts to be distributed as follows:

(1.) One-third to Zion Baptist Church with \$100. to go direct to the choir of said church.

(2) One-third to Jessie Lancaster, my mother's first cousin for her kindness and words of cheer given to me during my trying period.

(3) One-third to Pauline Dobbins for her kindness over a period of years.

H. My jewelry I give as follows:

(1) Black ear-rings brooch to set and silver to Hattie Watson.

(2.) Amethyst ring and ear-rings I give to Edith M. Clayton who was also born in the month of February.

(3.) Cluster diamond ring and one stone diamond ring I give to my friend, Faustine Brown.

(4) My mother's two stone diamond I give to Edna Silas.

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460 only one there at the time, I was the only one that
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F. Property owned by me in the state of New Jersey I give to Helen Alexander.

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(3) One-third to Pauline Dobbins for her kindness over a period of years.

H. My jewelry I give as follows:

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(2.) Amethyst ring and ear-rings I give to Edith M. Clayton who was also born in the month of February.

(3.) Cluster diamond ring and one stone diamond ring I give to my friend, Faustine Brown.

(4) My mother's two stone diamond I give to Edna Silas.

(5) My large stone diamond ring I give to Doctor E. B. Henderson of Virginia.

(6) My diamond brooch I give to my friend Keturah Barnes.

I. All furniture and household items are to be divided among Hattie Watson, Jessie Lancaster, and all they do not want to be given at their discretion to those they see fit.

K. All money in bank or in Oriental Association is to be used for up-keep of lot at Harmony Cemetery, all vacant graves to be used at discretion of my executrix.

(L.) I hereby make, constitute my cousin, Hattie B. Watson sole executrix of this my will; and I expressly declare it to be my will that she shall not be required to give bonds or security of any kind in any court or jurisdictions in the District of Columbia or elsewhere.

(M) In witness whereof, I have hereunto subscribed by name and fixed my seal, in the city of Washington District of Columbia, this 19th day of April in this year of our Lord, One Thousand, nine hundred and fifty (1950)

Signed,

Witnesses: May 7, 1950

Alvin F. Robinson, M.D.

Elizabeth H. Lurton, N.

Marion E. Sabbs

Marion E. Sabbs

Defendant's EXHIBIT NO. 3

FILED

MAY 25 1951

THEODORE COGSWELL,
CLERK OF WILL & C.
Clerk of Probate Court

D-157

I, Marion E. Babbe of the city of Washington, in the District of Columbia, being above the age of twenty-one (21) years and also being of sound and disposing mind, memory and discretion do hereby make, order and declare this my will and testament - - that is to say.

A. I order and direct that my executor, hereinafter named shall pay all my just debts and funeral expenses as soon as convenient ~~thereafter~~ after my death.

B. All insurance is made payable to the executor for funeral expenses.

C. Life endowment policy I give to my god-child Ronald Robbins to be used as a starter for his college education.

D. All money due to me from James Broad of Va. I give to Hattie B. Watson.

E. Property owned by me in Maryland I give to Doctor Rumbert C. Jones of Maryland.

F. Property owned by me in the state.

of New Jersey I give to Helen Alexander.
 H. All property owned by me & that
 I have an interest in except that
 mentioned above in C, and F, I want sold
 and money divided in three parts
 to be distributed as following

$\frac{1}{3}$ to Zion Baptist church with
 \$100 to go direct to the choir of
 said church.

$\frac{1}{3}$ to Jesse Lane Carter my mother's
 first cousin for her kindness and words
 of cheer given me during my trying
 period.

$\frac{1}{3}$ to Pauline Dobbin for her
 kindness over a period of years.

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 Black earrings brooch, tract and
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 in the month of February.

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 diamond ring I give to my friend
 F. Austine Brown

4. My mother's two stone diamond I
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6. My diamond brooch I give to my friend Feturah Barnes.

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8. All money in bank or Oriental Association is to be used for upkeep of lot at Harmony cemetery. All vacant graves to be used at the discretion of my executor.

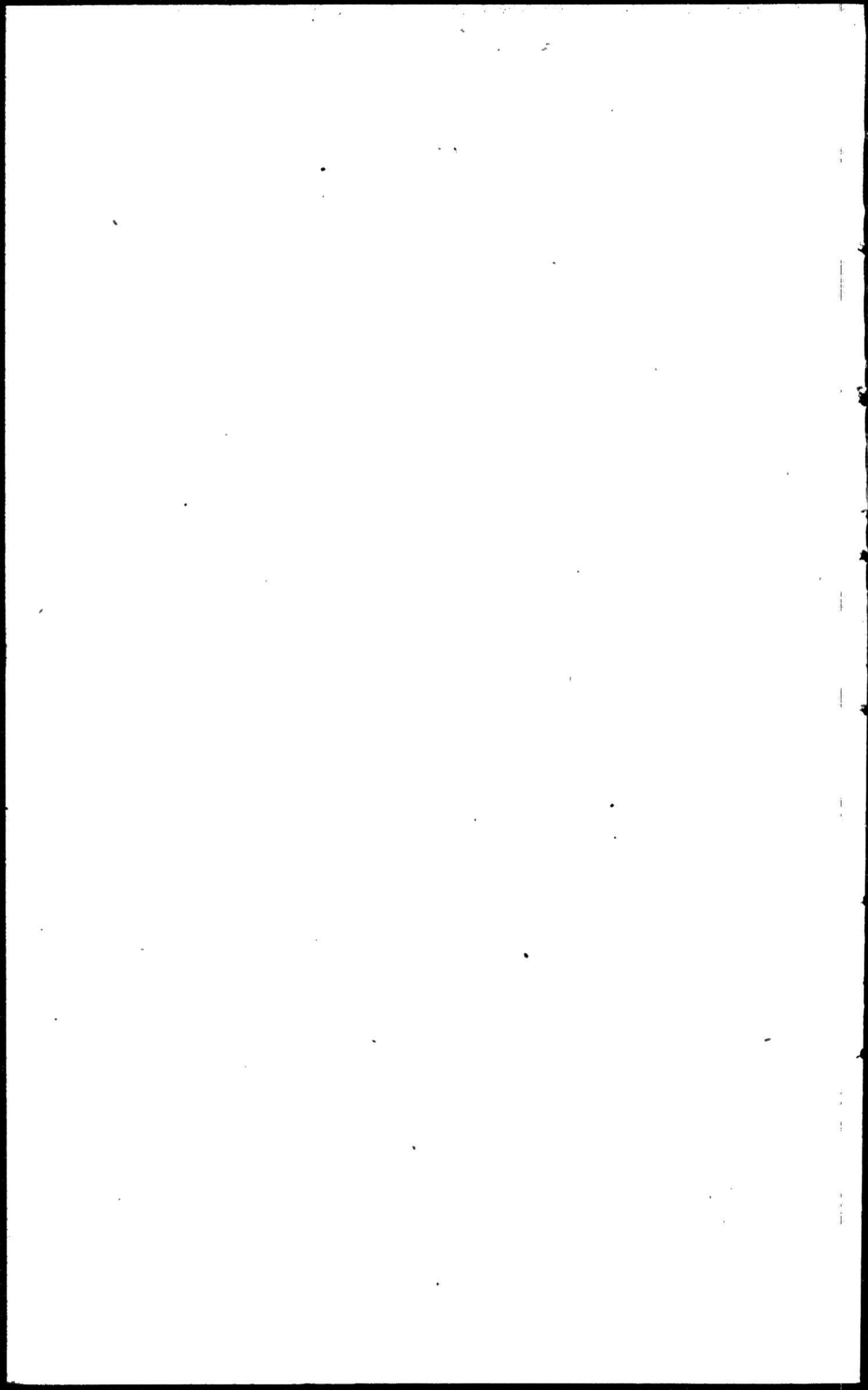
9. I hereby make, constitute, my cousin Nathie B. Watson sole and entire executrix of this my will; and I expressly declare it to be my will that she shall not be required to give bonds or security of any kind in any court or jurisdiction within the District of Columbia or elsewhere.

M. In witness whereof

I have hereunto subscribed my name and fixed my seal in the city of Washington, District of Columbia, this 19 day of April, in this year of our

nine hundred

and One Thousand and fifty



IN THE
UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1952 *United States Court of Appeals*
For the
District of Columbia Circuit

No. 11,015 **FILED** MAR 28 1952

HENRY A. COLLINS, ET AL.,
Appellants

v.

PAULINE DOBBINS, ET AL.,
Appellees

PETITION FOR REHEARING

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Petitioners*

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SUBJECT INDEX

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The Holding of This Court That as a Matter of Law Testatrix Did Not Possess the Requisite Mental Capacity at the Time of the Execution of the Will Is Erroneous in That the Holding Is Based Upon Evidence That This Court and the Trial Court Were Prohibited by District of Columbia Code, 1940, Title 14, Section 308, from Considering _____ 2

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IN THE
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January Term, 1952

No. 11,015

HENRY A. COLLINS, ET AL.,
Appellants

v.

PAULINE DOBBINS, ET AL.,
Appellees

PETITION FOR REHEARING

Appellees, by their attorneys, petition the Court to grant a rehearing in the above-entitled cause, and upon such rehearing and further consideration to reverse its opinion rendered herein on March 13, 1952, and sustain the verdict and judgment of the Court below in favor of the caveatees-petitioners; or, failing in that, to modify said opinion dated March 13, 1952, and order a new trial. In support of this petition appellees state:

- A. THAT THE HOLDING OF THIS COURT THAT AS A MATTER OF LAW TESTATRIX DID NOT POSSESS THE REQUISITE MENTAL CAPACITY AT THE TIME OF THE EXECUTION OF THE WILL IS ERRONEOUS IN THAT THE HOLDING IS BASED UPON EVIDENCE THAT THIS COURT AND THE TRIAL COURT WERE PROHIBITED BY DISTRICT OF COLUMBIA CODE, 1940, TITLE 14, SECTION 308, FROM CONSIDERING.

- B. SINCE THE EVIDENCE INTRODUCED BY THE CAVEATORS CONCERNING MENTAL CAPACITY WAS ABSOLUTELY PROHIBITED BY THE STATUTE THERE WAS NO COMPETENT EVIDENCE OF MENTAL INCAPACITY AND THEREFORE, THE DIRECTED VERDICT IN FAVOR OF THE CAVEATEES WAS CORRECT, EVEN THOUGH THE TRIAL COURT MIGHT HAVE GIVEN A WRONG REASON.
- C. THIS COURT'S ACTION IN REVERSING WITHOUT REMANDING THE CAUSE FOR A NEW TRIAL IS VIOLATIVE OF THE SEVENTH AMENDMENT TO THE CONSTITUTION AND THE FEDERAL RULES OF CIVIL PROCEDURE.

ARGUMENT

- A. The Holding of This Court That as a Matter of Law Testatrix Did Not Possess the Requisite Mental Capacity at the Time of the Execution of the Will Is Erroneous in That the Holding Is Based Upon Evidence That This Court and the Trial Court Were Prohibited by District of Columbia Code, 1940, Title 14, Section 308, from Considering.

1. Under the Statute, in the absence of consent by the patient or his personal representative, a physician or surgeon is prohibited absolutely from disclosing any confidential information acquired by reason of the physician-patient relationship.

The evidence concerning testatrix's physical and mental condition at the time of the execution of the will consisted of the testimony of the testatrix's attending physician; two physicians who were members of the staff of the hospital where the testatrix was treated; the clinical record of the hospital itself; an autopsy performed by members of the hospital staff, and the expert testimony of a Dr. Jason, who was likewise a member of the hospital staff and whose expert opinion was based on the other medical evidence in the case. This medical evidence was received without objection from the caveatees and obviously constituted the only

basis for the trial court's statement " * * * there is no doubt that she was not in a condition to execute a serious document, such as a will or deed or contract, with judgment and understanding." It is equally obvious that the decision of this Court dated March 13, 1952, was also based upon a review of that evidence.

It is the contention of petitioners that the reception of above-mentioned medical evidence was absolutely prohibited by District of Columbia Code, 1940, Title 14, Section 308, and that even though the caveatees made no objection thereto the statute precludes both the trial court and this Court from considering such evidence.

The Code provision under consideration reads as follows:

"In the Courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or his personal representative, to disclose any information confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity." (Emphasis ours.)

This Court has held that the above-quoted statute in broad terms *renders a physician an incompetent witness* to testify concerning confidential information acquired in attending a patient, with the single exception that he may testify with the consent of the patient or his personal representative.

Hutchins v. Hutchins, 48 App. D. C. 495

In the absence of consent by the patient or his personal representative the attending physician or surgeon may testify as to his employment by the patient, and the time, place and cause of death; but as to all knowledge or information obtained through disclosures made by the patient, as well as through his observation or examination of the patient and all inferences and conclusions drawn therefrom, the statute seals his lips.

Labofish v. Breman, 60 App. D. C. 397

Furthermore, the witness may not determine for himself the permissible limits of his testimony, *but such determination must be made by the Court itself.*

Hutchins v. Hutchins, supra
Stafford v. American Security & Trust Co., 60 App.
 D. C. 380

This Court has also held that the prohibition of the statute runs as well against a hospital record prepared by a representative of the hospital where the patient was treated;

Eureka, Maryland Assurance Co. v. Gray, 74 App.
 D. C. 191

and that such a record is admissible only to show the patient's name, address and age, provided there is no disclosure of diagnosis and treatment.

Kaplan v. Manhattan Life Insurance Co., 71 App.
 D. C. 250

As to the autopsy report, the evidence showed that the autopsy was performed by members of the staff of the hospital where testatrix had been a patient; that Dr. Jason, who testified concerning the autopsy findings was likewise a member of the hospital staff, and that his expert opinion was based upon the evidence that was prohibited by the statute. Under the circumstances, it is respectfully submitted that the autopsy findings and the testimony of Dr. Jason were also prohibited by the statute and that neither the trial court nor this Court could properly consider the evidence. This position seems entirely reasonable and consistent with the intent of the statute and has judicial support in the case of *Mathew v. Rex Health & Accident Ins. Co.*, 86 Ind. App. 335, 157 N. E. 467 (1927), where the Court in holding inadmissible an autopsy record where the physician performing the autopsy was a member of the staff of the hospital where the patient had died, used the following significantly applicable language:

"The fact that the boy was a patient at the hospital provided the opportunity for having the autopsical examination. It was an outgrowth of the relationship existing between the patient and the hospital, and it would not have been performed except for the fact of that relationship. If it had been held by the physician who treated the boy before his death, such physician would have been in incompetent witness as to any information acquired by reason of such examination. Any physician or surgeon assisting him would also have been incompetent to testify, over objection, to any knowledge acquired thereby.

"Can a physician after the death of his patient, through his consent or connivance, allow another physician to take the dead body of his patient, and in the absence of friends and relatives and without the consent of anyone, hold a *post mortem* examination, and thus give to the public the information which the physician in charge could not? Can a hospital, immediately after the death of one of its patients, discharge the physician who attended the patient up to the time of death and thereafter rush the dead body to the morgue and direct the physician at the head of the pathological department to perform an autopsy, and thus evade the statute which sealed the lips of the first physician?

"We think these questions should be answered in the negative, and that a physician under such circumstances steps into the shoes of the attending physician, and must be treated as if he were the assistant of the attending physician holding the autopsy at the direction of the latter, and that the information acquired by him through the autopsy is privileged. A physician should not be privileged to authorize or permit another physician to hold an autopsy and destroy the privileged character of the information thus acquired."

Applying the above-mentioned principles of law to the instant case petitioners respectfully submit that all of the medical evidence was prohibited by the statute and, in the absence of a waiver, could not be considered by either the trial court or this Court.

2. There was no waiver and under the circumstances of this case there could be no waiver of the privilege.

At the time of the trial of this cause the decedent's will had not been admitted to probate and no executor or other "personal representative" had been appointed. The proceedings were adversary with the heirs being aligned against the nominated executor and opposed to the directions of the deceased. This Court has established that an executor "eo nomine" is not a "personal representative" under the statute and may not waive the privilege established by the statute;

McCartney v. Holmquist, 70 App. D. C. 334

and that the heirs may waive only where they stand in a patient's shoes for the purpose of enforcing the particular substantive right of the patient and where there is no controversy between them and the executor,

Calhoun v. Jacobs, et al., 79 U. S. App. D. C. 29

Thus in the absence of anyone competent to waive the privilege such privilege could not be waived and it was the duty of the trial court to exclude the evidence on its own motion even though no objection was made and after it was improperly in evidence the trial court and this Court should have disregarded it.

cf. *Hutchins v. Hutchins*, supra

Stafford v. American Security & Trust Co., supra

Such a conclusion seems inescapable for certainly if the executor "eo nomine" had no power to waive the privilege his failure to object to the evidence could not constitute a waiver. In addition, this conclusion is supported by the cases of other jurisdictions. In *Weil v. Weil*, 136 N. Y. S. 190 (1912), the Court, in construing a statute similar to the District of Columbia statute, stated:

"It is of no consequence that the defendant was not present to object to the evidence. *The code does not*

*provide that such evidence may be received if not objected to * * * The prohibition is absolute, that the physician shall not be allowed to testify, and it remains effective unless the provisions are expressly waived on the trial by the patient * * * The Court should not have received the evidence, and if it was received inadvertently, should have disregarded it * * ** (Emphasis ours).

In *Westphal v. State*, 79 N. Y. S. (2d) 634 (1947), the Court held that the testimony of a physician prohibited by the statute from disclosure of information obtained by him in course of professional treatment of the patient is not admissible even though not objected to, unless properly waived on trial by the patient.

See also:

Hubbell v. Grant, 39 Mich. 641

Tingley v. State, 16 Okla. Cr. 639

Slate v. Madden, 201 N.W. 297 (Minn.)

Woodville v. Woodville, 63 W. Va. 286, 60 S.E. 140

The Supreme Court of the United States has also held that errors appearing on the record without objection or assignment may be reversed by the appellate court.

Garland v. Davis, 45 U. S. 131

In the light of these decisions it is submitted that it was error for this Court to have considered the medical evidence bearing on the question of the testatrix's mental capacity and that a rehearing should be granted to correct such error.

B. Since the Evidence Introduced by the Caveators Concerning Mental Capacity Was Absolutely Prohibited by the Statute There Was No Competent Evidence of Mental INCAPACITY and Therefore, the Directed Verdict in Favor of the Caveatees Was Correct, Even Though the Trial Court Might Have Given a Wrong Reason.

A review of the record in this case reveals that the caveators relied almost exclusively upon the medical evidence re-

ferred to above to show testamentary incapacity. It has already been shown herein that the medical evidence should have been excluded or disregarded by the court. It follows, therefore, that when such evidence is disregarded, *there remains no evidence of testamentary incapacity* upon which a verdict for the caveators could be returned. Under such state of the record the trial court was right in directing a verdict for the caveatees. In directing that verdict the Court commented upon incompetent evidence and made some wholly extraneous remarks concerning same. Nevertheless, in spite of his consideration of this incompetent evidence, and although it may be argued that the legal basis upon which the court directed the verdict is questionable, the direction of the verdict was correct and proper and this Court should have affirmed the ultimate result, even though the trial judge might have assigned a wrong or untenable reason for its action.

The position herein contended for has ample support from decisions of the Supreme Court of the United States. In *Riley v. Commissioner, etc.*, 311 U. S. 59, that Court stated:

“Where the decision below is correct it must be affirmed by the appellate court even though the lower tribunal gave a wrong reason for the action.”

In *United States v. Holt*, 270 U. S. 49, the Court said:

“Navigability when asserted as a basis of a right under the Constitution of the United States is a Federal law to be determined according to the general rule recognized and applied in the Federal Courts, *but notwithstanding the error below in accepting a wrong standard of navigability, the finding must stand if the record shows that according to the right standard the lake was navigable.*” (Emphasis ours).

See also: *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U. S. 208.

So here, even though the court below might have adopted a wrong standard of mental capacity, the direction of the ver-

dict must stand since the record shows that by the *right* standard there was no competent evidence of mental incapacity.

C. This Court's Action in Reversing the Trial Court Without Remanding the Cause for a New Trial Is Violative of the Seventh Amendment to the Constitution and the Federal Rules of Civil Procedure.

Preliminary to a discussion of the reasons and authorities upon which petitioners rely to support their contention that the reviewing Court's action was contrary to law, in that it violated the Seventh Amendment and the Federal Rules of Civil Procedure, it is necessary to focus the Court's attention upon two aspects of this case: (a) the procedural steps taken by the parties in the trial court; (b) the action which the trial court took (*in contrast to what the trial court said*).

(a) At the close of all the evidence the caveatees-petitioners moved for a directed verdict. *The caveators-respondents, at no time during the course of the trial made a motion for a verdict in their favor.* The caveatees' motion was granted and verdict entered thereon. Subsequent to entry of verdict the caveators moved for judgment N. O. V. and a motion for new trial in the alternative, which motions were denied and judgment entered upon the directed verdict. Thereupon appeal to this Court was taken by the caveators.

(b) In directing the verdict, the trial court included *dicta*, portions of which this Court quoted in its opinion of March 13, 1952. Petitioners submit that this *dicta* is to be taken as such and is not to be construed as an expression of the trial court in the exercise of a fact-finding function. A directed verdict presupposes that there is no controverted material issue of fact for the jury, and is proper only under such a circumstance.

Marchetti v. Olyowski, 86 U. S. App. D. C. 215, 181 F. (2d) 285 (1950)

Vives v. Serralles, 145 F. (2d) 552 (1st Cir. 1944)
Waters v. Kings County Trust Co., 144 F. (2d) 680
 (2d Cir. 1944), *cert. denied*, 323 U. S. 769, *rehearing*
denied, 323 U. S. 817.

It seems plain that, in spite of its *dicta*, the trial court did not—indeed, could not—find that the testatrix did not possess the requisite mental capacity at the time the will was executed. As a matter of fact the trial judge directed the jury to find that “* * * the said Marion E. Sabbs at the time of the making and subscribing or of acknowledging by her of the said paper writing (was) of sound and disposing mind and capable of executing a valid deed or contract.” It seems equally plain, in light of the legal theory applied by the trial judge, that the trial court took the view that in order to have the requisite mental capacity the only decisive and material factual questions were (1) whether the testatrix had the necessary testamentary capacity at the time the will was copied, and (2) whether the testatrix had sufficient physical and mental capacity to sign her name at the time of execution. The caveatees’ evidence upon these two questions was uncontroverted. The evidence upon the only issues which the trial judge deemed material, upon his legal theory, being all on one side and leaving no doubt as to what the facts were as to those issues, he granted the caveatees’ motion for a directed verdict. See *Roth v. Swanson*, 145 F. (2d) 262 (8th Cir. 1944); *Aetna Casualty & Surety Co. v. Yeatts*, 122 F. (2d) 350 (4th Cir. 1941).

It might be said in closing this preliminary discussion that the above analysis is made with no attempt to argue the merits of the legal theory and the rule of law applied by the trial court, but merely to set before the Court what, in our opinion, is an accurate picture of what the trial court did and did not do.

The development of our contention that the decision of this Court is in conflict with the Seventh Amendment to the

Constitution and the Federal Rules of Civil Procedure follows:

At common law a judgment always followed the verdict unless the record itself disclosed that a contrary judgment was required as a matter of law. If the verdict was wrong as a matter of law on the evidence rather than on the pleadings, the only remedy was a new trial. On review, the upper Court could only order a new trial, and could not order a verdict as it originally should have been. *Parsons v. Bedford*, 3 Pet. 433 (1830); *U. S. v. Wonson*, 1 Gall. 5 (1812); *United States v. Gardner*, 133 F. 285 (9th Cir. 1904); *Atlantic Coast Line R. Co. v. Canady*, 122 Fla. 447, 165 So. 629 (1936); *Funkley v. Ridgway*, 158 Minn. 265, 197 N.W. 280 (1924); *Snyder v. Portland R. Light & P. Co.*, 107 Ore. 673, 215 P. 887 (1923); *Campbell v. Weller*, 25 Wyo. 65, 164 P. 881 (1917).

The question of the power of a federal circuit court of appeals to enter a judgment notwithstanding the verdict was raised in the case of *Slocum v. New York Life Insurance Co.*, 228 U. S. 364 (1913). There at the close of all the evidence the defendant moved for a directed verdict. Motion was denied and a general verdict was returned for the plaintiff. The defendant's motion for judgment N. O. V. was denied and judgment entered for plaintiff on the verdict. Defendant excepted and appealed. The circuit court of appeals reviewed the case and directed a judgment N. O. V. for the defendant in accordance with the practice of the Pennsylvania courts. The United States Supreme Court held that the circuit court's action was an infraction of the right to a trial by jury guaranteed by the Seventh Amendment; that it was unconstitutional for the upper Court to review the facts and give a verdict upon those facts. It accordingly modified the judgment of the circuit court of appeals by eliminating the direction to enter judgment for the defendant notwithstanding the verdict and by substitut-

ing a direction for a new trial. The rule in the *Slocum* case operated to deprive Federal Courts of the power to direct judgment N. O. V. on the evidence. They were required to grant a new trial, even though the evidence be so unsubstantial that a verdict should have been directed the other way. *Pedersen v. Delaware L. & W. R. Co.*, 229 U. S. 146 (1913); *Engemoen v. Chicago, St. P. M. & O. R. Co.*, 210 F. 896 (8th Cir. 1914); *Pacific Mills v. Farish*, 213 F. 448 (1st Cir. 1914); *Norton v. City Bank & T. Co.*, 294 F. 839 (4th Cir. 1923); *Clemence v. Hudson & M. R. Co.*, 11 F. (2d) 913 (2d Cir. 1926); *Green Constr. Co. v. Chicago R. I. & P. R. Co.*, 65 F. (2d) 852 (10th Cir. 1933); *Aetna Casualty & S. Co. v. First Nat. Bank*, 103 F. (2d) 977 (3rd Cir. 1939).

However, the Federal Courts thereafter found a way to circumvent the effect of the *Slocum* decision by resorting to the common law method of reservation by the trial court of decision upon a question of law until the jury had rendered its verdict. Thus, in the case of *Baltimore & Carolina Line v. Redman*, 295 U. S. 654 (1935), the defendant moved for a directed verdict in its favor. The Court reserved decision upon this question of law, in accordance with the New York statute and practice in this respect, submitted the case to the jury subject to its opinion on the question of law reserved, and received a verdict for the plaintiff. Thereafter the Court held the evidence to be sufficient and entered judgment for the plaintiff on the verdict. Upon defendant's appeal to the circuit court, that Court held the evidence insufficient and reversed the judgment with a direction for a new trial, holding that under the doctrine of the *Slocum* case it could not constitutionally direct a verdict for the defendant and that it could only direct a new trial. However, the Supreme Court held that, in reversing because as a matter of law the evidence was insufficient to sustain the verdict, the circuit court should direct a judgment for dismissal and not send the case back for a new trial, and that such a judg-

ment of dismissal would be the equivalent of a judgment N. O. V.

The Supreme Court distinguished the *Redman* case from the *Slocum* case on the ground that in the *Slocum* case the defendant's motion for a directed verdict was denied without reservation by the Court of the question of law as to the sufficiency of the evidence, while in the *Redman* case the trial court had expressly reserved the question of law raised by defendant's motion for a directed verdict and had received the verdict for the plaintiff subject to the Court's ruling upon the question of law reserved.

Thus, the power of the Federal Courts of Appeal to direct a judgment N. O. V. without violating the Seventh Amendment depended upon whether or not the trial court in denying a motion for directed verdict had reserved the question of law before receiving a verdict against the moving party. If there was no express reservation of the question of law raised by a motion for a directed verdict and the Court denied the motion and received a verdict against the moving party the *Slocum* rule was applicable to bar the trial court or the reviewing court from entering or directing a judgment N. O. V. *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389 (1937). There the matter rested until the advent of the new Federal Rules of Civil Procedure in 1938. Since it is petitioners' contention that this Court's action in this case is not in conformity with Rule 50(b) of the Federal Rules of Civil Procedure, petitioners will set forth Rule 50(b) in its entirety for the convenience of the Court.

“RULE 50. MOTION FOR A DIRECTED VERDICT

“(a) * * * * *

“(b) Reservation of Decision on Motion. *Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the*

legal questions raised by the motion. Within 10 days after the reception of a verdict, *a party who has moved for a directed verdict* may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." (Emphasis ours.)

Rule 50(b) embodies the procedure laid down in the *Redman* case whereby the trial court or the reviewing court may enter or direct judgment N. O. V. on the evidence consistent with the Seventh Amendment. However, a motion for a directed verdict must have been made at the close of all the evidence by the party for whom the judgment N.O.V. is requested. A verdict must be entered against such moving party. But the rule also (1) renders automatic the reservation by the court of its decision on the question of law raised *by the motion for a directed verdict which it denies or for any reason fails to grant*, thereby removing the necessity for an express reservation; (2) regulates the time and manner for the making of motions *by a party who has unsuccessfully moved for a directed verdict* and entry of judgments thereunder; (3) permits the filing of a motion for a new trial jointly or in the alternative with the motion to have judgment entered *in accordance with the party's motion for a directed verdict*.

The Supreme Court of the United States was called upon to determine the appropriate procedure under Rule 50(b)

in the case of *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243 (1940). There, the defendant moved for a directed verdict at the close of all the evidence, which motion was denied and a verdict received for the plaintiff, on which judgment was entered. Within ten days the defendant moved to have the verdict and judgment thereon set aside and judgment entered in accordance with his motion for directed verdict, and for a new trial in the alternative. The trial court entered a judgment for the defendant N. O. V. without ruling upon the motion for a new trial.

The plaintiff appealed to the Circuit Court of Appeals which decided that the District Court erred in holding the evidence insufficient to go to the jury. It reversed the judgment and remanded with instructions to enter judgment on the verdict in favor of the plaintiff. On review, the Supreme Court held in part as follows:

"If alternative prayers or motions are presented as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon, he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment N. O. V. and also denies a new trial the judgment on the verdict stands, and the losing party may appeal from the judgment entered upon it, assigning as error both the refusal of judgment N. O. V. and errors of law in the trial as heretofore (citing *Hall v. Weare*, 92 U. S. 728, 732). The appellate court may reverse the former action and itself enter judgment N. O. V. or it may reverse and remand for a new trial for errors of law."

It seems clear then that either the trial court or the reviewing court may constitutionally enter a judgment N. O. V. in accordance with Rule 50(b). However, by its terms, Rule 50(b) is applicable only where a motion for a directed verdict was made at the close of the evidence, by the party requesting the judgment N. O. V. Under similar state statutes it has been held that a motion for a directed verdict made by the party requesting judgment N. O. V. at the close of all the

evidence is a condition precedent to the granting of a judgment notwithstanding the verdict. See, for example, *Re Caldwell*, 216 Cal. 694, 16 P 2d 139 (1932); *Funkley v. Ridgway*, 158 Minn. 265, 197 N.W. 280 (1924); *Baird v. Stephens*, 58 N.D. 812, 228 N.W. 212 (1929). Federal cases are in accord: A judgment N. O. V. may be entered only if a motion for a directed verdict has been made at the close of the evidence by the requesting party and then only if the motion for a directed verdict should have been granted. *Southeastern Greyhound Lines v. McCafferty*, 169 F. (2d) 1 (6th Cir. 1948); *Hawkins v. Sims*, 137 F. (2d) 66, 67 (4th Cir. 1943); *Aetna Casualty & Surety Co. v. Yeatts*, 122 F. (2d) 350 (4th Cir. 1941).

Moreover, it is well established that the appellate court is powerless to review the sufficiency of the evidence to support the verdict if the appellant made no motion for a directed verdict in the trial court. *A. M. Webb & Co. v. Robert P. Miller Co.*, 176 F 2d 678 (3d Cir. 1949); *Black, Swalls & Bryson v. Shondell*, 174 F 2d 587 (8th Cir. 1949); *McGurty v. Transcontinental & Western Air*, 167 F 2d 406 (7th Cir. 1948); *Harnick v. Lilley*, 167 F 2d 159 (8th Cir. 1948); *Itzkall v. Carlson*, 151 F 2d 647 (2d Cir. 1945); *Minnehaha County S.D. v. Kelley*, 150 F 2d 356 (8th Cir. 1945); *Edwards v. Craig*, 138 F 2d 608 (7th Cir. 1943); *F. W. Woolworth Co. v. Seckinger*, 125 F 2d 97 (5th Cir. 1942); *Aetna Casualty & Surety Co. v. Yeatts*, 122 F 2d 350 (4th Cir. 1941).

Such a rule tends to promote efficiency in the administration of the judicial processes and is in harmony with the underlying reasons which led to the adoption of Rule 50(b). A party who makes no motion for a directed verdict must be of the opinion that the evidence of his opponent makes a case for the jury and should not be permitted to impute error to the Court in allowing it to go to the jury or, *a fortiori*, in directing a verdict in favor of his opponent. Where a defendant has failed to move for a directed ver-

dict at the close of evidence and is content to gamble on the result of a verdict, he should not be permitted to later question the sufficiency of his opponent's evidence. *Cf. Woodbridge v. Du Pont*, 133 F 2d 904 (2d Cir. 1943). *Cf. also, Cove v. West Virginia Pulp & Paper Co.*, 330 U. S. 212, 91 L. Ed. 849 (1947) (Circuit Court of Appeals is without power to direct a judgment N. O. V. where defendant failed to submit a motion therefor to the trial judge); *Globe Liquor Co. v. Roman*, 332 U. S. 571 (1948) (Circuit Court of Appeals is without power to direct entry of judgment N. O. V. where defendant failed to submit motion therefor to trial judge under Rule 50(b) in cases where verdict was and in cases in which it was not directed).

When the above points and authorities are brought to bear upon the facts of the *Sabbs* case, herein involved, it becomes readily apparent that the action taken by the Court of Appeals in reversing without remand for a new trial is not in conformity with Rule 50(b) and is not consistent with the Seventh Amendment to the Constitution. No motion was made by the caveators-respondents during the course of the trial for a directed verdict against the caveatees-petitioners. Hence, no question of law as to the sufficiency of the caveatees' evidence was raised to be reserved by the Court expressly or to be reserved automatically by the operation of Rule 50(b). The doctrine of the *Redman* case, *supra*, is not applicable, since there was no motion and no express reservation of any legal question thereby raised; nor is Rule 50(b) available to cloak the Court's action with the mantle of constitutionality, since there was no motion made and no automatic reservation of any legal question thereby raised. The case inescapably falls under the constitutional bar imposed by the *Slocum* case, *supra*. Indeed, there is even less to commend the instant case for here, to repeat, no motion at all was made for a directed verdict by the party requesting judgment N. O. V., while in the *Slocum* case such a motion had been made.

The only pertinent question of law determined by the trial court was the question raised by the caveatees' motion for a directed verdict in their favor: The sufficiency of the caveators' evidence to go to the jury. The trial court in granting the motion decided that as a matter of law the caveators' evidence was insufficient. To say that the trial court erred in its determination of this question is simply to say that the caveators' evidence is sufficient to go to the jury. But this Court of Appeals has decided more. It has in effect decided that not only is the caveators' evidence sufficient to go to the jury, *but also, as a matter of law, that the caveatees' evidence is insufficient to go to the jury.* Thus, it has decided a question of law which not only was not reserved at the trial, either expressly or automatically, but was not even raised. It is, of course, obvious that the question of the legal sufficiency of the caveatees' evidence was not raised by the caveators at the close of the evidence because they made no motion for a directed verdict. It is but little less obvious that this question was not raised by the caveators' motion for judgment N. O. V., because under Rule 50(b) a motion for judgment N. O. V. can only be made by "a party who has moved for a directed verdict. * * *". The caveators-respondents' motion for judgment N. O. V. was therefore unauthorized, a nullity, and incapable of raising any question of law. *Southeastern Greyhound Lines v. McCafferty, supra; Hawkins v. Sims, supra; Aetna Casualty & Surety Co. v. Yeatts, supra.*

In light of the above analysis and the authorities contained therein, we submit that the Court of Appeals in reversing the judgment entered in favor of petitioners without remand for a new trial, where respondents had made no motion for a directed verdict in their favor and where no question of law as to the sufficiency of petitioners' evidence was raised or reserved, expressly or automatically, deprived the petitioners of their right to a jury trial guaranteed by the Seventh Amendment to the Constitution and

contravened Rule 50(b) of the Federal Rules of Civil Procedure.

CONCLUSION

Petitioners respectfully submit that the matters hereinbefore urged are substantial; were not considered at the previous hearing; and a consideration thereof is necessary to a just and equitable decision of this matter. They therefore urge that a rehearing be granted; that the opinion of this Court dated March 13, 1952, be reversed, and that the verdict and judgment of the trial court be sustained; or, failing therein, that the decision of March 13, 1952, be modified and a new trial granted.

Respectfully submitted,

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CERTIFICATE

Ambrose Shief, Jr., and Joseph C. Waddy, counsel for the appellees, Pauline Dobbins, et al., do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

AMBROSE SHIEF, JR.

JOSEPH C. WADDY
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Petitioners

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing appellees' petition for rehearing was served by us on James A. Washington, Jr. and William S. Thompson, attorneys for appellants, 613 F Street, N.W., Washington, D. C. on March 28, 1952.

AMBROSE SHIEF, JR.

JOSEPH C. WADDY

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